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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. 75-6821

COLORADO CIVIL RIGHTS COMMISSION
and RAYMOND WENDELL HOLMES,

Petitioners,

v.

COLORADO SPRINGS COACH CO., and
BYRON COWART,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

OPINION BELOW

The opinion of the Colorado Court of Appeals is reported at ___ Colo. App. ___, 536 P.2d 837 (Appendix D).

JURISDICTION

The Colorado Court of Appeals' judgment was entered on March 11, 1975. A petition for rehearing was denied on April 1, 1975. The court of appeals' mandate issued on April 10, 1975. A petition for writ of certiorari from the Colorado Supreme Court was denied on July 7, 1975. Petitioner was granted an extension of time until November 10, 1975 within

which to seek certiorari from this court by order dated September 28, 1975.

Jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Does the application of *res judicata* barring determination by the Colorado Civil Rights Commission of claims of employment discrimination deny due process to petitioner Holmes and others similarly situated?

2. Does the application of *res judicata* discriminate on the basis of wealth against petitioner Holmes and others similarly situated by unreasonably burdening their right to seek relief from the Colorado Civil Rights Commission?

3. Does the application of *res judicata* barring determination by the Colorado Civil Rights Commission of claims of employment discrimination deprive petitioner Holmes and others similarly situated of federal rights under Title VII of the Civil Rights Act of 1964?

CONSTITUTIONAL PROVISION

AMENDMENT XIV

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

The statutes primarily involved are the Colorado Antidiscrimination Act of 1957, C.R.S. 1973, 24-34-301 *et seq.*; the Colorado Employment Security Act, C.R.S. 1973, 8-70-101 *et seq.*,

and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. The relevant portions of the statutes are appended hereto (Appendix E).

STATEMENT OF THE CASE

Petitioner, Raymond Wendell Holmes, was employed by the Colorado Springs Coach Company from July, 1969 to March, 1970, and from August, 1970 to on or about February 15, 1971, when he was terminated by the company "for failure to work assigned runs." (Transcript, Civil Rights Commission Hearing, Vol. I, pp. 21, 37; Complainant's Exhibit 5). Subsequent to his termination, Holmes filed a claim with the Industrial Commission of Colorado (serving ex officio as the Unemployment Compensation Commission of Colorado) for unemployment compensation benefits. A decision by a deputy denied Holmes' claim. On appeal, a hearing was held before a referee. Holmes attempted to introduce evidence in support of his allegation that his discharge was the result of racial discrimination, but the referee refused to admit evidence on that issue. (Transcript, Vol. I, pp. 44,62; Respondent's Exhibit 4, pp. 6,8,16). A "no-award" decision was given, which was subsequently upheld by the Industrial Commission (Appendix A; Transcript, Vol.II, pp. 218, 220; Respondent's Exhibit 3).

On March 30, 1971, Holmes filed a complaint with the Colorado Civil Rights Commission, charging that his termination from employment was due to racial discrimination. A "Notice of Hearing" was issued, and a hearing was convened on September 15, 1975. The question as to whether the prior "no-award" determination by the Industrial Commission barred a decision by the Civil Rights Commission on the allegation of racial discrimination was raised by the hearing officer. (Transcript, Vol.I, p.5). Petitioner responded in a "Memorandum of Commission" that an individual "should not be deprived of a full hearing" in one forum as a result of having sought relief first in the other. The memorandum concluded that to deny Holmes the right to pursue his remedies under the Colorado Antidiscrimination Act

of 1957 would "deny him a basic statutory and constitutional right." (Memorandum of Commission, pp. 1,7).

On September 24, 1973, the hearing officer issued an "Initial Decision" (Appendix B), in which he found that the determination of the Industrial Commission awarding no benefits to Holmes did not bar a decision by the Civil Rights Commission on the charge of racial discrimination. On the merits, the officer ruled that Holmes was terminated from employment as a bus driver with Colorado Springs Coach Co. because of his race (Negro) and color (Black) and ordered his reinstatement with back pay. The hearing officer's decision automatically became the decision of the Civil Rights Commission after the expiration of 30 days. C.R.S. 1973, 24-4-105(14).

The District Court of El Paso County set aside the decision of the Civil Rights Commission on the ground that the proceedings before the Commission were barred under the doctrine of *res judicata* by the earlier determination by the Industrial Commission (Appendix C).

On appeal to the Colorado Court of Appeals, petitioner Holmes again argued that "persons availing themselves of these forums [the Industrial Commission and the Civil Rights Commission] are entitled to the full protection of each of these bodies and a full hearing before them." (Opening Brief, p.4). Petitioner emphasized the importance to the poor of unemployment benefits on the one hand, and the fundamental nature of the rights sought to be vindicated before the Civil Rights Commission on the other. (Opening Brief, pp.7, 12). The court of appeals affirmed the judgment of the district court on March 11, 1975, holding that the doctrine of *res judicata* barred the Civil Rights Commission from hearing the charge of racial discrimination (Appendix D). Holmes' petition for rehearing was denied on April 1, 1975.

On petition for writ of certiorari from the Colorado Supreme Court, Holmes sought relief from the "unconscionable choice"

presented to a discharged employee, as a result of the court of appeals' decision, between relief from the economic hardship of unemployment and freedom from racial discrimination, and asserted that the denial of a hearing before the Civil Rights Commission deprived him of "due process." (Petition for Writ of Certiorari, pp.5, 13). The Colorado Supreme Court denied his petition on July 7, 1975.

ARGUMENTS AND REASONS FOR GRANTING THE WRIT

I.

APPLICATION OF *RES JUDICATA* BARRING DETERMINATION BY THE COLORADO CIVIL RIGHTS COMMISSION OF CLAIMS OF EMPLOYMENT DISCRIMINATION DENIES DUE PROCESS TO PETITIONER HOLMES AND OTHERS SIMILARLY SITUATED.

Only twelve years have passed since this court was required to overrule a decision of the Colorado Supreme Court restricting the jurisdiction of the Colorado Antidiscrimination Act of 1957. In *Colorado Antidiscrimination Commission et al v. Continental Airlines, Inc.*, 372 U.S. 714 (1963), the court rejected the state supreme court's holding that the act did not apply to interstate carriers. Justice Black, writing for a unanimous court, emphasized at p. 717:

> The obvious importance of even partial invalidation of a state law designed to prevent discriminatory denial of job opportunities prompted us to grant certiorari.

Once again, we ask the court to grant certiorari to review a state appellate court decision which radically limits the jurisdiction of the Colorado Antidiscrimination Act of 1957.

While the *Continental* case involved the Antidiscrimination Commission's (now, the Colorado Civil Rights Commission)

jurisdiction over a class of employers, the present case concerns its jurisdiction over complaints of discriminatory discharge from employment. The court below held that the denial of unemployment compensation by the Industrial Commission is *res judicata* on the issue of whether the discharge resulted from racial discrimination and the Civil Rights Commission is barred from determining that issue in a subsequent proceeding. The court reached that result even though petitioner Holmes was denied the opportunity to be heard on the issue of race discrimination by the Industrial Commission and his proffered evidence of discrimination was rejected as irrelevant.

We submit that the issues raised by this petition are of equal importance to those decided in the *Continental* case. The decision of the Colorado Court of Appeals denies due process, as defined in the Fourteenth Amendment, to Holmes, and others similarly situated, in the following manner:

First, the novel application of *res judicata* by the appellate court denied Holmes the opportunity to be heard on his claim of racial discrimination before either the Industrial Commission or the Civil Rights Commission.

Second, the decision in this case was an abrupt departure from established state procedure for adjudicating claims of discriminatory discharge. Because Holmes could not have foreseen this result, it is a denial of due process to hold that he waived his remedy under the Antidiscrimination Act by following the statutory procedures for processing both his unemployment compensation and discrimination claims.

Third, where the legislature has established an agency with expertise in employment discrimination and has given it adjudicatory powers, Holmes is denied his right to a "fair trial" before a "fair tribunal" if he is required to litigate his discrimination complaint before another agency which lacks such expertise.

Each issue will be considered in the order presented.

A. *Holmes was denied the opportunity to be heard.*

The statement of facts set forth above shows that Holmes first filed a claim for unemployment compensation which was initially denied. At his appeal of the initial denial, Holmes asserted that he had been wrongfully discharged because of his race, but his evidence of discrimination was rejected as not relevant to his unemployment compensation claim. He then proceeded to the Civil Rights Commission where his claim of discrimination was heard and decided in his favor.

Under the court's ruling, however, the hearing before the Civil Rights Commission was improper. Holmes' remedy, according to the court, would have been to seek judicial review of the unemployment compensation examiner's refusal to hear his evidence of race discrimination. The time for seeking such judicial review had long since expired when the court's decision was issued, and thus, Holmes was denied any hearing on his claim.

Colorado has guaranteed to its citizens the right to be free from racial discrimination in the various phases of employment, including discharge. C.R.S. 1973, 24-34-306(a). Elimination of racial discrimination in employment is "one of the most cherished aims in American feeling." *Railway Mail Association v. Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J. concurring). Having guaranteed this right to petitioner Holmes, the state cannot deprive him of his right without due process of law. At the very least, Holmes was entitled to notice and a hearing. *Goss v. Lopez*, 419 U.S. 565 (1975).

We submit that basic due process was denied to Holmes under the rationale of *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff*, the state supreme court repeatedly had construed a certain remedy as appropriate. A later ruling that the remedy could be had only after exhaustion of administrative remedies (no longer available due to the

statute of limitations) was held to violate due process in the primary sense of the denial of the opportunity to be heard. See also *Friederichsen v. Reynard*, 247 U.S. 207, 213 (1918).

B. *Holmes did not knowingly waive his right to be heard.*

Holmes' action in pursuing separate claims with respect to unemployment compensation and employment discrimination was clearly reasonable. Prior to the decision in this case, the two statutes were seen as complementary: unemployment compensation provided short term subsistence relief while a favorable decision in a discrimination action could result in reinstatement and back pay. Holmes, of course, is not an attorney and pursued his complaints *pro se*. But even if he had had counsel, the existing state of the law would not have warned him. Indeed, the one relevant Colorado case, a trial court decision, had held that prior arbitration did not bar submission of the same claim to the Civil Rights Commission. *Adolph Coors Co. v. Colorado Civil Rights Commission et al*, 5 FEP Cases 254 (1971).

At the proceedings on his unemployment compensation claim, no one advised Holmes that he was waiving his rights under the Antidiscrimination Act. In fact, the ruling rejecting his claim of discrimination can be construed as a contrary advisement. Thus, Holmes proceeded on the understanding that his discrimination complaint would be heard by the Civil Rights Commission. The court of appeals implies that Holmes waived his right to a hearing when he did not appeal the ruling in his unemployment compensation case, but Holmes' inaction surely was not an effective waiver.

To be effective, a waiver of due process rights must be made with knowledge and understanding of the consequences of such action. *Fuentes v. Shevin*, 407 U.S. 67 (1972). *See also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (requiring "an intentional relinquishment or abandonment of a known right or privilege" in a criminal case regarding right to counsel). In this case, Holmes clearly lacked the knowledge and understanding

to waive his right to a hearing. The contrary conclusion reached by the court of appeals cannot stand.

C. *In this context, a "fair trial" before a "fair tribunal" requires a hearing under the Colorado Antidiscrimination Act of 1957.*

As this court has often said, the due process hearing requirement is a flexible concept and the nature of the hearing depends "on appropriate accommodation of the competing interests involved." *Goss v. Lopez, supra*. The minimal due process requirement of a "fair trial" before a "fair tribunal" applies to proceedings before administrative agencies. *Withrow v. Larkin*, ___U.S.___, 95 S.Ct. 1456 (1975).

In the area of employment discrimination, we submit that the state legislature has defined what constitutes a "fair trial" before a "fair tribunal" by enacting the Colorado Antidiscrimination Act of 1957 and providing a mechanism for resolving claims before the Civil Rights Commission. The strained application of *res judicata* by the court of appeals results in the denial of a "fair trial" and a "fair tribunal" because the discharged employee is compelled to submit his discrimination claim to an agency with no expertise in employment discrimination, with a very abbreviated hearing procedure and with no authority to order an appropriate remedy if it were to find discrimination had occurred. Although the decision suggests a race between the two agencies to decide the discrimination issue, the procedural differences insure that in most, if not all, cases the first determination will be made on the unemployment compensation claim.

A brief review of the two statutes will illustrate the differences in the hearings provided by the two agencies. The Colorado Civil Rights Commission receives complaints, investigates, makes a finding of probable cause and attempts to conciliate the complaint. If conciliation fails, the matter is heard in a trial-type hearing with a commission attorney representing the complainant. C.R.S. 1973, 24-34-307. The commission may issue a cease and desist order and may order appropriate relief including affirmative action,

back pay, reinstatement or promotion. *Id.* Judicial review of the commission's order may be sought in the appropriate district court. C.R.S. 1973, 24-34-308.

The unemployment compensation law emphasizes the need for a speedy determination of eligibility. An initial determination of eligibility may be appealed within the agency to a referee and reviewed by the Industrial Commission. C.R.S. 1973, 8-74-102, 104, 105. Although the act requires a "fair hearing" before the referee, no trial-type hearing is guaranteed nor is counsel provided to the complainant. The referee's decision is subject to judicial review by the court of appeals on an accelerated calendar and review is "in a summary manner." C.R.S. 1973, 8-74-109. Benefits available under this act are limited to weekly payments.

The pertinent inquiry in an unemployment compensation claim is whether the claimant became unemployed "through no fault of his own," and the act specifies factors which will result in either no award or a limited award to a claimant. C.R.S. 1973, 8-73-108. These disqualification standards are unusually stringent and the resultant rate of disqualification for unemployment compensation in Colorado is among the highest in the United States. In 1974, Colorado had the third highest rate of disqualification among the states; 68.8 claimants per 1,000 sampled were denied by Colorado compared to 26.0 per 1,000 sampled in the nation as a whole. U.S. Department of Labor, Manpower Administration, *Unemployment Insurance Statistics*, Table 13 "Denials of Benefits Under State Programs By Issue, January-December 1974."

Given these standards for disqualification, it would not be inconsistent to find both that an individual had been discharged because of his race and that he was ineligible for award on other grounds. In that case, evidence of discrimination may be irrelevant to determining eligibility.

Implicit in the decision now at issue is the court's assumption that unemployment compensation officials are competent to

decide cases of racial discrimination. That assumption cannot stand in the face of the legislative declaration vesting that authority in the Civil Rights Commission. Thus, we submit that the legislature has balanced the competing interests and devised an adjudicatory process which provides substantial protections to the complainants in employment discrimination cases. The court below denied the due process rights of Holmes and other complainants by relegating them to a truncated procedure before agency officials with no expertise in employment discrimination.

II.

APPLICATION OF *RES JUDICATA* DISCRIMINATES ON THE BASIS OF WEALTH AGAINST PETITIONER HOLMES AND OTHERS SIMILARLY SITUATED BY UNREASONABLY BURDENING THEIR RIGHT TO SEEK RELIEF FROM THE COLORADO CIVIL RIGHTS COMMISSION.

Petitioner Holmes and others similarly situated are discriminated against on the basis of wealth as a result of the court of appeals' application of the doctrine of *res judicata*. Although the court of appeals' ruling ostensibly allows an employee who claims he was discharged because of racial discrimination to pursue his remedies before either the Civil Rights Commission or the Industrial Commission, both economic necessity and the regulatory scheme compel him to seek relief from the Industrial Commission. The court effectively has forced the discharged employee to choose between two rights provided by the state. If he chooses to vindicate his civil rights, he can do so only at the very high cost of surrendering his subsistence payments under unemployment compensation. Clearly this is a choice available only to those who have sufficient financial resources to forego unemployment compensation. Conditioning an important right, such as the right to be free from racial discrimination, on the financial resources of the claimant violates the Equal Protection Clause and denies substantive due process.

Lines drawn on the basis of wealth are traditionally disfavored. *Harper v. State Board of Elections*, 383 U.S. 663 (1966). This is so even where no explicit classification on the basis of wealth has been made. Thus in *Harper, supra*, the imposition of a poll tax on all voters, which had the practical effect of discriminating against those voters who could not afford to pay the tax, was invalidated as a violation of equal protection. Similarly, in the instant case, the court of appeals' ruling has the effect of denying those discharged employees who cannot afford to forego their right to seek unemployment benefits the right to pursue their remedies under the Colorado Antidiscrimination Act of 1957.

Consequently, the quality of the hearing which the discharged employee obtains depends upon his wealth. Prior rulings of this court indicate that such discrimination violates the Equal Protection Clause.

As this court stated in *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." In *Griffin, supra*, this court held that the Equal Protection Clause was violated where the poor were denied adequate appellate review because they were unable to afford to order trial transcripts. In *Douglas v. California*, 372 U.S. 353, 356 (1963), where an indigent's right to appointed counsel on appeal was upheld, this court stated:

> . . . [In California] the type of an appeal a person is afforded in the District Court of Appeals hinges upon whether or not he can pay for the assistance of counsel. If he can, the appellate court passes on the merits of his case only after having the full benefits of written briefs and oral argument by counsel. If he cannot, the appellate court is forced to prejudge the merits of his case before it can even determine whether counsel should be provided.[1]

[1] The California rule required the appellate court to review the record in order to decide whether or not to appoint counsel.

In the instant case, the discharged employee who is without means must submit to the abbreviated procedures of the Industrial Commission, where he will be without counsel and will not be entitled to the full hearing provided by the Colorado Antidiscrimination statute.

Although petitioner and others similarly situated could conceivably seek redress of their grievances in the federal courts, this does not remove the state's obligation to avoid discriminating against them because of their indigency. In *Smith v. Bennett*, 365 U.S. 708, 713 (1961), this court struck down an Iowa law which required a prisoner seeking a writ of habeas corpus in state court to pay a filing fee. The court remarked that it would "ill-behoove" the state of Iowa to send indigent prisoners to federal court to seek enforcement of their rights.

The right to be free from racial discrimination, which petitioner seeks to assert before the Colorado Civil Rights Commission, is one of the most basic guarantees of our Constitution. *Brown v. Board of Education*, 347 U.S. 483 (1954). Thus, legislative classifications based on race have been considered inherently suspect and have been subjected to the closest judicial scrutiny in order to determine whether compelling state interests justified such distinctions. Moreover, this court has zealously protected persons engaged in seeking the redress of racial grievances. See *NAACP v. Button*, 371 U.S. 415 (1963). So, in the instant case, where the right sought to be vindicated is freedom from racial discrimination, this court should look closely at the reasons for subjecting petitioner and others similarly situated to a different treatment because of their poverty than would be afforded to those of more ample means. The apparent justification for the application of the doctrine of *res judicata* is one of judicial economy. Such a purpose, although legitimate in its proper sphere, cannot be used to deny a fair hearing to the financially disadvantaged who claim that their discharge from employment was the result of racial discrimination.

This court has also invalidated burdens on the exercise of important rights under the Due Process Clause. Thus in *Boddie v. Connecticut*, 401 U.S. 371 (1971), a Connecticut requirement of payment of court fees and costs to file for divorce was struck down because it restricted the access of the poor to the divorce courts solely on the basis of their indigency. As Justice Brennan pointed out in his concurring opinion to *Boddie*, *supra*, the issue, which the majority treated as one of due process, inevitably involved considerations of equal protection as well. Similarly, in *Lindsey v. Normet*, 405 U.S. 56 (1972), this court held that the requirement that a tenant post a double bond on appeal from an adverse judgment in a forcible entry and detainer action heavily burdened the tenant's right to appeal and was particularly discriminatory against the poor, and therefore violated the Equal Protection Clause.

The effect of the application of the doctrine of *res judicata* in the instant situation is to preclude discharged employees who lack financial means from obtaining an adjudication of alleged civil rights violations before the Colorado Civil Rights Commission. They are therefore denied the full hearing provided for such claims by the Colorado Antidiscrimination Act of 1957. Moreover, the application of *res judicata* unreasonably burdens their right to assert their claims of racial discrimination. Such treatment, arbitrarily imposed upon the petitioner and others similarly situated solely because of their wealth, finds no justification in any meaningful state interest, and therefore denies them the equal protection of the laws.

III.

APPLICATION OF *RES JUDICATA* BARRING DETERMINATION BY THE COLORADO CIVIL RIGHTS COMMISSION OF CLAIMS OF EMPLOYMENT DISCRIMINATION DEPRIVES PETITIONER HOLMES AND OTHERS SIMILARLY SITUATED OF FEDERAL RIGHTS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Under the scheme of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(c), the Federal Equal Employment Opportunity Commission must defer jurisdiction to a state agency with expertise and similar enforcement power for 60 days or until action by the state is terminated, whichever is earlier.[2] After this deferral period, the federal and state agencies have concurrent jurisdiction. The Colorado Civil Rights Commission has qualified as a deferral agency under this provision. Under Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b), the federal agency is required to "accord substantial weight to the final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements under [subsection] (c)." Generally, the federal agency defers all action until the state has completed its proceedings.

Because these provisions authorize concurrent jurisdiction of matters which would otherwise be adjudicated in federal court, the state court should have upheld the jurisdiction of the Civil Rights Commission in order to protect petitioner's federal rights. When concurrent jurisdiction exists, the state court is generally required to adjudicate the federal action. *Testa v. Katt*, 330 U.S. 386 (1947); *Claflin v. Houseman*, 93 U.S. 130 (1876); *Mondou v. New York, N.H. & H R. Co.*, 223 U.S. 1 (1912).

This court has held that application of principles such as *res judicata* and collateral estoppel is inappropriate in the sensitive area of employment discrimination. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 nn.10 & 11 (1974). The Sixth Circuit stated the prevailing rule in *Tipler v. E. I. duPont de Nemours and Co.*, 443 F.2d 125, 128-9 (6th Cir. 1971), which involved the application of the doctrine of *res judicata* to a claim of discrimination which was first raised before the National Labor

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[2] The federal agency, under contract to coordinate efforts and to conform state procedures and standards to the requirements of Title VII, provides substantial federal funding to the state agency.

Relations Board and later before the Equal Employment Opportunity Commission, as follows:

> Despite the possible applicability of these doctrines [*res judicata* and collateral estoppel] to administrative decisions, in the instant action it would be inappropriate to apply either. The issue here is whether appellee's dismissal was in violation of Title VII of the Civil Rights Act of 1964. The NLRB decision, on the other hand, dealt with the alleged violation of the National Labor Relations Act. Although these two acts are not totally dissimilar, their differences significantly overshadow their similarities. [citations omitted] Absent a special consideration a determination arising solely under one statute should not automatically be binding when a similar question arises under another statute. [citations omitted] This is because the purposes, requirements, perspective and configuration of different statutes ordinarily vary.

The "purposes, requirements, perspective and configuration" of the Colorado Employment Security Act, which provides temporary unemployment compensation, and the Colorado Antidiscrimination Act of 1957, which provides Title VII protections against discrimination, clearly differ. Therefore, in order to protect Title VII charging parties' federal rights to a hearing and remedy before the state deferral agency, the principle of *res judicata* should not be applied.

The Colorado Antidiscrimination Act of 1957 is the only Colorado statute which provides remedies, including cease and desist orders, against discrimination in employment, and it is enforceable solely through the Colorado Civil Rights Commission. Under the court of appeals' decision, when a victim of an alleged discriminatory discharge seeks unemployment compensation, the state may no longer enforce the Antidiscrimination Act against the employer. Figures compiled by the Colorado Civil Rights Commission for fiscal year 1975 show that 63%

of the employment complaints received by the Commission were discharge cases. The effect of the court of appeals' decision therefore is to nullify nearly two-thirds of all state enforcement procedures against employment discrimination. Such acquiescence by the state in discrimination prohibited by federal law is clearly invalid. See *Reitman v. Mulkey*, 387 U.S. 369 (1967). Moreover, the "obvious importance of reviewing even partial invalidation of a state law designed to prevent the discriminatory denial of job opportunities" is even greater here than in *Continental Airlines*, *supra* at 717, because the state procedure is an integral part of the protection of federal rights.

CONCLUSION

For the reasons stated, petitioner respectfully requests that a writ of certiorari be granted to review the judgment of the Colorado Court of Appeals.

Respectfully submitted,

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Appendix A

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF COLORADO
(EX-OFFICIO UNEMPLOYMENT COMPENSATION COMMISSION OF COLORADO)

DD 5496-71
RD 6124-71
IC 4659-71

In the Matter of:

Claimant: *Raymond Wendell Holmes-SS#* 458-58-4796
424 Placid Road
Colorado Springs, Colorado 80910

Employer: Colorado Springs Coach Company
Post Office Box 1180
Colorado Springs, Colorado 80910

Joslyn Fruit Company
3725 East Boulder
Colorado Springs, Colorado 80909

ORDER OF THE COMMISSION
AFFIRMING DECISION OF THE REFEREE

The above mentioned appeal was considered this 10th day of June, 1971. The Commission having examined the records in this case, including all of the documents, papers, and transcript of the testimony taken at the hearing in this matter, FINDS:

That the Findings of Fact of the Referee are supported by competent and substantial evidence and that the decision of the said Referee was made in accordance with the law.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED That the Findings of Fact and the Decision

of the Referee in this matter shall be deemed to be the decision of the Industrial Commission of the State of Colorado (Ex-Officio Unemployment Compensation Commission of Colorado).

This decision shall become final unless within ten (10) days from the date of mailing a Petition to Review the same is filed in the Local Employment Service Office, or with the Division of Employment, 1210 Sherman Street, Denver, Colorado 80203.

INDUSTRIAL COMMISSION OF COLORADO
(Ex-Officio Unemployment Compensation
Commission of Colorado)

(s) Albert S. Mangan

(s) Chester L. Hoskinson

Commissioners

Date Mailed: June 14, 1971

Appendix B

STATE OF COLORADO
BEFORE THE COLORADO CIVIL RIGHTS COMMISSION

Complaint No. E-460 (71-72)

RAYMOND HOLMES,	)	
	)	
Complainant,	)	
	)	
v.	)	INITIAL
	)	DECISION
COLORADO SPRINGS COACH CO.,	)	
and BYRON COWART,	)	
	)	
Respondents.	)	
	)	

William H. Levis, Attorney-Investigator, Denver, Colorado, for Complainant and the Commission.

Bruce L. Craig, Attorney at law, Colorado Springs, Colorado, for Respondents.

In this case the Complainant alleges that he was discharged by Respondents from his employment as a bus driver for Respondent Colorado Springs Coach Co. (referred to as the "Coach Company") by reason of his race and color.

Hearing commenced on September 15, 1972, and was interrupted while Respondents sought judicial relief with respect to one issue discussed herein. The hearing resumed and was concluded on March 16, 1973. Except for recognition of the purely formal documents of record which were introduced at the initial hearing, this case will be treated as having been heard *de*

novo on March 16, 1973, on which date Respondents were at all times present and represented by counsel.

Decision will enter in part for Complainant and in part for Respondents as set forth herein.

I. RES JUDICATA

Respondents say that a decision of the Industrial Commission awarding no grant of unemployment benefits to Complainant is res judicata of the issues presented in this case.

The Commission responds that the Industrial Commission has no authority nor jurisdiction to determine whether an individual was discharged by reason of discrimination, so that issue is left for determination by the Commission.

This issue has now been repeatedly determined by the Commission and the several courts adversely to the position of Respondents. We consider ourselves bound by those rulings. If Respondents are to pursue their contentions concerning res judicata, it must be on appeal.

II. THE MERITS

The decision on the merits is rather simple. When the evidence discloses disparate treatment of employees of different races, and there is no reasonable explanation for the different treatment, discrimination at the very least may be inferred. Perhaps better put, when there is disparate treatment of persons depending upon their respective races or colors, that is discrimination.

That is the case here in two respects.

First, the uncontradicted evidence shows disparate treatment in the manner of disciplining and terminating drivers for failure to report for work. Apparently, from Complainant's Exhibit 7, it is not atypical for personnel of the Coach Company to miss a day of work and, presumably, be replaced for that day by a

standby driver. The evidence discloses that Complainant, a Negro, was late for work on one occasion and missed all or half of a day on four other occasions. During the same period Caucasian driver Edgell missed work or was late on nine occasions before his eventual termination. Caucasian driver was allowed seven missed days before he was terminated, and, unlike Complainant, he was first subjected to the lesser sanction of a three-day suspension before termination. Caucasian employee Winget was also allowed the lesser sanction of suspension in spite of violations of safety rules after warnings and apparent repeated tardiness. Complainant Holmes was terminated with no opportunity for a lesser sanction such as suspension for less grave offenses than the Caucasian drivers. In addition, it was admitted that calls were made to driver Edgell to attempt to secure his attendance; no such calls were made to Complainant. Finally, there apparently is a company policy of suspending wrongdoers for periods of three, six and fifteen days, progressively, before termination. That was not followed in Complainant's case.

Second, it was testified that Respondent Cowart himself investigated each case before an employee was terminated. This investigation, he said, included conversations with any superintendent who recommended discharge, the union and any persons in the shop having knowledge of circumstances of the situation. This investigation did not take place in the case of the discharge of Complainant Holmes. Indeed, there was a joke among a number of workers that Complainant was quitting to work at or attend race tracks, but Mr. Cowart did not even become aware of this joke until some days later.

These disparities clearly involve and are a part of and a cause of the termination of Complainant.

Mr. Cowart testified that in all respects other than being late on the occasions mentioned Complainant was a satisfactory employee.

We find that Complainant Holmes was treated differently than Caucasian employees and that he was discharged as a result of his race and color by the Respondent Coach Company.

There is no sufficient showing whether the calls that were made, the suspensions of other drivers and the like were at the hands of superintendents or Respondent Cowart himself. There is no sufficient showing that he personally was or is in violation of the Act.

III. THE COACH COMPANY'S SUCCESSORS

Complainant Holmes has sought reinstatement, and that relief will be ordered.

There is some question whether that reinstatement can apply to those routes taken over by successors.

We do not believe we can order an organization not a party to this proceeding to do anything.

Complainant cites cases in which a party in privity with another can be bound by the acts of that other. However, those cases are real estate cases dealing with privity of title. This case is different. And in those cases the successor was granted his day in court to say whether or not he should be bound.

In this case, a successor to the Coach Company may or may not be bound by this decision because it has some contractual obligation to be bound by all liabilities of the Coach Company.

A successor may or may not be bound by virtue of some variant of the "successor doctrine" of federal labor law.

A successor may not be bound because the Public Utilities Commission of Colorado has primary jurisdiction.

We express no opinion as to any of these matters.

What we do say is that we will not make any directive, one way or another, to a party who is not before us to express his views. If the Complainant contends that some successor is bound by operation of law by this decision, that is for another hearing, or for a proceeding before a court, with notice and service upon that party.

CONCLUSION

In addition to the preceding findings, we specifically find that:

1. The Commission has jurisdiction of the subject matter of the complaint and has jurisdiction of Respondents.

2. Respondent Colorado Springs Coach Co. terminated Complainant Holmes from his position as bus driver because of his race and color.

3. There is no sufficient evidence to determine that Respondent Cowart discriminated against Complainant Holmes.

We conclude as a matter of law that Respondent Colorado Springs Coach Co. violated the Act by discharging Complainant Holmes, and that Complainant Holmes is entitled to reinstatement with back pay. The complaint is dismissed insofar as it pertains to Respondent Cowart.

Dated this 24th day of September, 1973.

Theodore M. Smith
Hearing officer

Appendix C

IN THE DISTRICT COURT WITHIN AND FOR
THE COUNTY OF EL PASO AND
STATE OF COLORADO
Civil Action No. 77768
Div. VI

COLORADO SPRINGS COACH COMPANY, a Colorado corporation, and BYRON COWART,	)	
Plaintiffs,	)	
vs.	)	**ORDER**
STATE OF COLORADO CIVIL RIGHTS COMMISSION and RAYMOND WENDELL HOLMES,	)	
Defendants.	)	

Petitioners' request for a judicial review of the decision of the Colorado Civil Rights Commission, pursuant to CRS 1963, 80-21-8, came on for hearing to the Court on June 7, 1974, Petitioners Colorado Springs Coach Company (the Coach Company) and Byron Cowart appearing by their attorney, Bruce L. Craig, Respondents Colorado Civil Rights Commission (Commission) and Raymond Wendell Holmes (Claimant) appearing by Jeffrey J. Sandman, Assistant Attorney General.

The record certified to the Court consists of transcripts of hearings conducted by a Hearing Examiner for the Commission on September 15, 1972 (Vol. I) and on March 16, 1973 (Vol. II),

as well as various files containing numerous exhibits and documents. A transcript of the hearing before the Industrial Commission on Mr. Holmes' claim for unemployment compensation conducted on April 19, 1971 was introduced into evidence before the Commission as Respondent's Exhibit No. 4 (Vol. II, Page 220). The record certified to this Court, however, did not contain such transcript, and a copy thereof has been obtained through the efforts of Mr. Sandman, which transcript has now been labeled Respondent's Exhibit No. 4 by the Court.

A summary of the record on what appears to be uncontroverted facts is in order prior to a ruling on the issues raised by the appeal.

Claimant had previously been employed by the Coach Company as a city bus driver, which employment he voluntarily terminated. Claimant again applied for the same position in July or August of 1970, and was promptly rehired by the Coach Company. On the date in question, February 13, 1971 (a Saturday), Mr. Holmes was working as a "protection" or "back-up" driver in the event a regular operator did not appear because of sickness or for some other reason. A regular driver did become ill, and Claimant was assigned to his run, which consisted of a split shift, one in the morning and one in the afternoon. Claimant completed his scheduled morning shift, but did not appear for the afternoon run and was not heard from until sometime the following Monday. On Monday afternoon he was informed of his discharge, and subsequently filed a claim for unemployment compensation. On or about March 30, 1971, Mr. Holmes also filed a charge of discrimination against the Coach Company with the Colorado Civil Rights Commission and with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964. The charge under the Federal Act is, apparently, still pending.

As shown by the transcript labeled Respondent's Exhibit No. 4, the April 19, 1971 Industrial Commission hearing was an appeal from two decisions denying Claimant any award. A review

of this transcript readily discloses that Claimant seeks unemployment compensation based on his allegation of wrongful discharge as a result of racial discrimination; in other words, that his employment was terminated through no fault of his own. Mr. Holmes presented a doctor's statement during this hearing to the effect that he was unable to work from February 13th to the 17th.

Claimant's contention that his discharge was a result of discrimination was not accepted by the Industrial Commission, their ruling being as follows:

> "It is concluded that the Claimant was discharged when he failed to make his scheduled runs or to inform the employer of his reasons, and he is found to be responsible for his discharge and is entitled to no award of benefits."

Claimant did not ask for a review of this decision by either the Industrial Commission or the Court.

The formal Answer filed by the Coach Company with the Commission, in response to the charge of discrimination, denied such charge and further denied jurisdiction of the Commission to hear the matter, for the reason that the issues had already been resolved by the Industrial Commission and its decision was res judicata.

At the initial hearing on September 15, 1972 before the Hearing Officer appointed by the Commission, counsel for the Coach Company asserted its defense of res judicata, thus placing in issue the jurisdiction of this body, but the Hearing Officer refused to rule on the matter. The representatives of the Coach Company and counsel then departed and the hearing continued in their absence.

As shown by the file, entitled, "District Court Proceedings," the Coach Company then sought a Writ of Prohibition in another

Division of this court on the grounds of res judicata and lack of jurisdiction. On motion of the Commission the action was dismissed, on the grounds, apparently, that the Commission had not yet issued a final order (or any order), which was necessary before the matter could be reviewed by the District Court.

Another hearing was then scheduled and conducted by the Hearing Officer on March 16, 1973 (Vol. II). The testimony during this hearing disclosed that the Coach Company ceased operation of the city bus system on September 15, 1972, which operation was taken over by the City of Colorado Springs on the following day with the permission of the Colorado Public Utilities Commission. After abandoning its city operation, the Coach Company was only authorized to operate charter trips outside the City of Colorado Springs and within the limits of the State of Colorado.

In his Initial Decision, the Hearing Officer concluded that (1) the Commission had jurisdiction over the subject matter and the parties, and (2) that the Coach Company terminated Claimant's employment "because of his race and color." He ordered reinstatement with back pay.

In his decision, the Officer also states that he is not considering the evidence received on September 15th, only the exhibits which were tendered. This Court, consequently, has excluded the testimony presented on such date, in its review and ruling.

The issues presented to this Court appear to be three in number:

> First: Has the adverse ruling of the Industrial Commission, which was not appealed, precluded Claimant from proceeding before the Commission under the doctrine of res judicata?
>
> Second: If the first question is answered in the negative, were the findings of the Commission supported by substantial evidence?

> Third: If so, did the Commission, after considering the evidence, exceed its authority in ordering reinstatement of Mr. Holmes with back pay?

The question of res judicata should first be decided by the Court. As previously mentioned, it is apparent that Claimant's basis for relief, and testimony in support thereof, was substantially the same before both the Industrial and Civil Rights Commissions; that is, a wrongful discharge as a result of a discriminatory act on the part of his employer.

In making its decision on unemployment compensation, the Industrial Commission necessarily had to decide whether the discharge was the result of a discriminatory act or whether it resulted from misconduct on the part of the Claimant. As shown by its decision quoted above, the charge of discrimination was rejected and compensation was denied.

The Hearing Officer for the Commission was faced with the same decision, and he reached an opposite conclusion.

Subsequent to the ruling by the Hearing Officer rejecting the defense of res judicata, the case of *Umberfield v. School District No. 11, et al* was decided by the Colorado Supreme Court on or about May 28, 1974. This case involved conflicting decisions of a Teacher Tenure Panel and the Civil Rights Commission. Judicial review of the decision of the Panel was not sought, but, instead, a new action was filed before the Commission, with a different result. In ruling that the Panel decision was res judicata, Justice Kelly points out the broad powers of the reviewing court under 1969 Perm. Supp., CRS 1963, 3-16-5(7), particularly where the record shows a denial of statutory or constitutional rights.

The conclusions reached in the *Umberfield* case appear to be pertinent to the instant case. Under CRS 1963, as amended, 82-4-8, the Industrial Commission is given broad powers and discretion in granting unemployment compensation, the amount

of such awards being dependent to a large extent on the reason for Claimant's unemployment. Surely, this body could consider the employee's claim of discrimination as well as the reasons advanced by the employer for his discharge in making their decision. As pointed out in the above decision, there is the additional safeguard of judicial review.

The fact that the two agencies might provide different remedies should not prevent the application of res judicata. Claimant chose his forum in filing for unemployment compensation, and to now allow him to prosecute a claim before another agency, under the same evidence, would tend to create an impossible situation for the courts.

For the reasons stated above, this Court would conclude that the doctrine of res judicata operates as a bar to the proceedings before the Civil Rights Commission.

In view of the foregoing conclusion, the Court will comment just briefly on the two remaining issues mentioned above.

It is apparent from the record that the findings of the Hearing Officer are based partially, if not entirely, on evidence that two or three Caucasian drivers had more "no shows" than Claimant (Claimant's Ex. No. 7) and were suspended prior to discharge.

The exact meaning of a "no show" is not clear from the record, although it is obvious that the term applies to a multitude of situations which vary from slight infractions of the rules to more serious breaches. There was also competent testimony that different rules applied to a driver who lost all contact and did not report for any assignment, as well as a driver listed as "off till report" (Vol. II, Pages 171 and 181).

In determining whether to suspend or discharge, it would not be unusual or improper for an employer to consider the seriousness of the current violation as well as the facts surrounding

any prior violations. Many factors would enter into this decision, including, by way of example, the following: If tardy, was he late two minutes or two hours? Did he have a justifiable excuse? Was contact established early in the process? Are we dealing with a short-term employee or one approaching retirement age? Did the violation cause undue hardship to the employer or any fellow employee? And, in the instant case, were the Caucasian drivers, at the time of their "no shows", working regularly assigned runs or were they "back-up" or "protection" drivers, as was Claimant at the time in question?

Without belaboring the point, the Court would conclude that facts necessary to support a fair inference of discrimination are not present in this case (*Colorado Civil Rights Commission v. School District No. 1*, Colo. App., 488 P. 2d 83).

As to the authority of the Commission to order reinstatement with pay, the record discloses that the Coach Company, as of September 16, 1972, because of severe financial difficulties, no longer has the authority to operate a city bus line. Its Certificate of Authority is now limited to charter trips outside the city, which requires drivers possessing certain qualifications and training for this type of operation. The Court would question the authority of the Commission to require reinstatement under these circumstances.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court, that, for the reasons stated above, the decision and order of the Colorado Civil Rights Commission be set aside and that the Complaint be dismissed.

DONE in Open Court, this 14th day of August, 1974.

BY THE COURT:

Hunter D. Hardeman
District Judge

Appendix D

COLORADO COURT OF APPEALS
No. 74-426

COLORADO SPRINGS COACH COMPANY, a Colorado Corporation, and BYRON COWART,	)
Plaintiffs-Appellees,	)
v.	)
STATE OF COLORADO CIVIL RIGHTS COMMISSION and RAYMOND WENDELL HOLMES,	)
Defendants-Appellants.	)

Appeal from the District Court of El Paso County
Honorable Hunter D. Hardeman, Judge

DIVISION I JUDGMENT AFFIRMED

Coyte, Van Cise, and Sternberg, JJ.

Bruce L. Craig
Colorado Springs, Colorado

Attorney for Plaintiffs-Appellees

John P. Moore, Attorney General
John E. Bush, Deputy Attorney General
Jeffrey I. Sandman, Assistant Attorney General
Denver, Colorado

Attorneys for Defendants-Appellants

Opinion filed and judgment entered on the 11th of March, 1975.

Opinion by JUDGE STERNBERG

Defendant Holmes was employed by the Colorado Springs Coach Company as a city bus driver from August 1970 to February 1971. The company discharged him for failure to appear for work. He filed a claim for unemployment compensation, but a determination of "no award" was made by a deputy referee. This decision was upheld by a referee following a hearing on April 19, 1971. Holmes' claim was based in part on the allegation that his discharge was the result of racial discrimination. However, the referee denied him benefits concluding that his discharge was based upon his failure "to make his scheduled runs or to inform his employer of his reasons." The Industrial Commission affirmed the decision, but Holmes sought no further review.

In March of 1971, Holmes filed a charge against the employer with the Colorado Civil Rights Commission alleging that his termination had been because of his race and color, and was therefore illegally discriminatory. Disregarding the employer's affirmative defense of *res judicata*, the hearing officer for the Civil Rights Commission found that the discharge was a violation of the Colorado Antidiscrimination Act of 1957, §24-34-301 et seq., C.R.S. 1973 (C.R.S. 1963, 80-21-1 et seq.), and ordered Holmes to be reinstated with back pay. This order was appealed to the district court. That court set it aside and dismissed the complaint. We affirm.

The case of *Umberfield v. School District No. 11*, ___ Colo. ___, 522 P.2d 730, controls this case. There, discharge of a teacher for failure to work on scheduled school days because of religious beliefs was upheld after a hearing held pursuant to the Teacher Tenure Act, §22-63-101 et seq., C.R.S. 1973 (1967 Perm. Supp., C.R.S. 1963, 123-18-1 et seq.). The teacher, Umberfield, did not appeal that action to the courts, but instead

filed a complaint with the Colorado Civil Rights Commission alleging religious discrimination. Holding that the complaint was barred, the Supreme Court stated:

> "Because Umberfield had a full adversary hearing before the Teacher Tenure Panel which had the power to determine all his claims of religious discrimination, we hold that the doctrine of *res judicata* operates as a bar to the relitigation of issues which Umberfield raised or could have raised in the hearing before that panel and on judicial review. . . . To hold otherwise could result in an anomalous situation where the same reviewing court would be compelled to affirm opposite results of the two administrative bodies."

Just as the Teacher Tenure Panel's conclusions could not be collaterally attacked by Umberfield, so must the decision of the Industrial Commission on the cause of termination of employment bar a subsequent proceeding before the Civil Rights Commission in this case.

Judgment affirmed.

JUDGE COYTE and JUDGE VAN CISE concur.

Appendix E
Colorado Antidiscrimination Act of 1957

C.R.S. 1973, 24-34-301. Short title. This part 3 shall be known and may be cited as the "Colorado Antidiscrimination Act of 1957".

24-34-302. Definitions. As used in this part 3, unless the context otherwise requires:

(1) "Apprenticeship" means any program for the training of apprentices including, but not limited to, any program providing the training of those persons defined as apprentices by section 8-15-101, C.R.S. 1973, whether or not such program is registered and approved by the apprenticeship council under section 8-15-105, C.R.S. 1973.

(2) "Commission" means the Colorado civil rights commission, created by this part 3, and the term "commissioner" means a member of that commission.

(3) "Coordinator" means the coordinator of fair employment practices, which office is created by this part 3.

(4) "Court" means the district court for the judicial district of the state of Colorado in which the asserted unfair employment practice occurred, or if said court is not in session at that time, then any judge of said court.

(5) "Employee" means any person employed by an employer, except a person in the domestic service of any person.

(6) "Employer" means the state of Colorado or any political subdivision, commission, department, institution, or school district thereof, and every other person employing persons within the state; but it does not mean religious organizations or associations, except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing.

(7) "Employment agency" means any person undertaking to procure employees or opportunities to work for any other person or holding itself out to be equipped to do so.

(8) "Joint apprenticeship committee" means any association of representatives of a labor organization and an employer providing, coordinating, or controlling an apprentice training program.

(9) "Labor organization" means any organization which exists for the purpose in whole or in part of collective bargaining, or of dealing with employers concerning grievances, terms, or conditions of employment, or of other mutual aid or protection in connection with employment.

(10) "On-the-job training" means any program designed to instruct a person who, while learning the particular job for which he is receiving instruction, is also employed at that job or who may be employed by the employer conducting the program during the course of the program or when the program is completed.

(11) "Person" means one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, or the state of Colorado, and all political subdivisions and agencies thereof.

(12) "Unfair employment practice" means those practices specified as discriminatory or unfair in section 24-34-306.

(13) "Vocational school" means any school or institution conducting a course of instruction, training, or retraining to prepare individuals to follow an occupation or trade, or to pursue a manual, mechanical, technical, industrial, business, commercial, office, personal service, or other nonprofessional occupation.

24-34-303. Civil rights division. There is hereby created a division of state government to be known and designated as the Colorado civil rights division which said division shall be under the jurisdiction and direction of the Colorado civil rights commission. The division shall have as its immediate supervisory head a coordinator of fair employment practices. Such coordinator shall be appointed by the governor pursuant to article XII, section 13 of the state constitution. Any coordinator so appointed shall at all times be under the direct supervision and control of the Colorado civil rights commission.

24-34-304. Civil rights commission - membership. The Colorado civil rights commission shall be the head of the division of civil rights within the department of regulatory agencies. The commission shall consist of seven members, who shall be appointed

by the governor, with the consent of the senate, for terms of four years, except that of the first members appointed, two shall be appointed for terms of two years and two shall be appointed for terms of three years. Appointments shall be made to provide geographical area representation insofar as may be practicable, and no more than four members shall belong to the same political party. Vacancies shall be filled by the governor by appointment, with the consent of the senate, and the term of a commissioner so appointed shall be for the unexpired part of the term for which he is appointed. Any commissioner may be removed from office by the governor for cause. Commissioners shall serve without compensation but shall be reimbursed for necessary travel expenses incurred by them while on official commission business. The commission may adopt, amend, or rescind rules for governing its meetings, and four commissioners shall constitute a quorum.

24-34-305. Powers and duties of commission. (1) The Colorado civil rights commission has the following powers and duties:

(a) To appoint such investigators and other employees and agents, pursuant to article XII, section 13 of the state constitution, as it may deem necessary for the enforcement of this part 3, and to prescribe their duties;

(b) To adopt, publish, amend, and rescind regulations consistent with and for the enforcement of this part 3;

(c) To receive, investigate, and pass upon complaints alleging discrimination in employment, apprenticeship programs, on-the-job training programs, or vocational schools or the existence of a discriminatory or unfair employment practice by a person, an employer, an employment agency, a labor organization, their employees or members, a joint apprenticeship committee, or a vocational school;

(d) To investigate and study the existence, character, causes, and extent of discrimination in employment, apprenticeship programs, on-the-job training programs, or vocational schools in this state by employers, employment agencies, and labor organizations, joint apprenticeship committees, or vocational schools and to formu-

late plans for the elimination thereof by educational or other means;

(e) (I) To hold hearings upon any complaint made against a person, an employer, an employment agency, a labor organization, their employees or members, a joint apprenticeship committee, or a vocational school; to subpoena witnesses and compel their attendance; to administer oaths and take the testimony of any person under oath, and to compel such employer, employment agency, labor organization, joint apprenticeship committee, or vocational school, official, or other person to produce for examination any books and papers relating to any matter involved in such complaint. Such hearings may be held by the commission itself, or by any commissioner, or by the coordinator, or by any hearing examiner appointed by the commission. If a witness either fails or refuses to obey a subpoena issued by the commission, the commission may petition the district court having jurisdiction for issuance of a subpoena in the premises and the court shall in a proper case issue its subpoena; refusal to obey such subpoena shall be punishable as contempt.

(II) No person may be excused from attending and testifying or from producing records, correspondence, documents, or other evidence in obedience to a subpoena in any such matter on the ground that the evidence or the testimony required of him may tend to incriminate him or subject him to any penalty or forfeiture; but no person may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence after having claimed his privilege against self-incrimination, except that such person so testifying may not be exempted from prosecution and punishment for perjury in the first degree committed in so testifying.

(f) To issue such publications and reports of investigations and research as in its judgment will tend to promote good will among the various racial, religious, and ethnic groups of the state and which will tend to minimize or eliminate discrimination in employment because of race, creed, color, national origin, or ancestry. Publications of the commission circulated in quantity

outside the executive branch shall be issued in accordance with fiscal rules promulgated by the controller pursuant to the provisions of section 24-30-208.

(g) To prepare and transmit annually, in the form and manner prescribed by the controller pursuant to the provisions of section 24-30-208, a report accounting to the governor and the general assembly for the efficient discharge of all responsibilities assigned by law or directive to the commission;

(h) To recommend policies to the governor and to submit recommendations to employers, employment agencies, and labor organizations to effectuate such policies;

(i) To make recommendations to the general assembly for such further legislation concerning discrimination because of race, creed, color, national origin, or ancestry as it may deem necessary and desirable;

(j) To cooperate, within the limits of any appropriations made for its operation, with other agencies or organizations, both public and private, whose purposes are consistent with those of this part 3, in the planning and conducting of educational programs designed to eliminate racial, religious, cultural, and intergroup tensions;

(k) To adopt an official seal.

24-34-306. Discriminatory and unfair employment practices. (1) It shall be a discriminatory or unfair employment practice:

(a) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against any person otherwise qualified because of race, creed, color, sex, national origin, or ancestry;

(b) For an employment agency to refuse to list and properly classify for employment or to refer an individual for employment in a known available job for which such individual is otherwise qualified because of race, creed, color, sex, national origin, or ancestry; or to comply with a request from an employer for referral of applicants for employment if the request indicates either directly or indirectly that the employer discriminates in employment on account of race, creed, color, sex, national origin, or ancestry;

(c) For a labor organization to exclude any individual otherwise qualified from full membership rights in such labor organization, or to expel any such individual from membership in such labor organization, or to otherwise discriminate against any of its members in the full enjoyment of work opportunity because of race, creed, color, sex, national origin, or ancestry;

(d) For any employer, employment agency, or labor organization to print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or membership, or to make any inquiry in connection with prospective employment or membership which expresses, either directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, sex, national origin, or ancestry, or intent to make any such limitation, specification, or discrimination; unless based upon a bona fide occupational qualification or required by and given to an agency of government for security reasons;

(e) For any person, whether or not an employer, an employment agency, a labor organization, or the employees or members thereof to aid, abet, incite, compel, or coerce the doing of any act defined in this section to be a discriminatory or unfair employment practice, or to obstruct or prevent any person from complying with the provisions of this part 3 or any order issued thereunder, or to attempt, either directly or indirectly, to commit any act defined in this section to be a discriminatory or unfair employment practice;

(f) For any employer, labor organization, joint apprenticeship committee, or vocational school providing, coordinating, or controlling apprenticeship programs or providing, coordinating, or controlling on-the-job training programs or other instruction, training, or retraining programs:

(I) To deny to or withhold from any qualified person because of his race, creed, color, sex, national origin, or ancestry the right to be admitted to or participate in an apprenticeship training program, on-the-job training program or other occupational instruction, training, or retraining program;

(II) To discriminate against any qualified person in his pursuit

of such programs or to discriminate against such a person in the terms, conditions, or privileges of such programs because of race, creed, color, sex, national origin, or ancestry;

(III) To print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for such programs, or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, sex, national origin, or ancestry or any intent to make any such limitation, specification, or discrimination unless based on a bona fide occupational qualification.

(g) For any private employer to refuse to hire, or discriminate against any person, whether directly or indirectly, who is otherwise qualified for employment, solely because the person did not apply for employment through a private employment agency; but an employer shall not be deemed to have violated the provisions of this section if such employer retains one or more employment agencies as exclusive suppliers of personnel and no employment fees are charged to an employee who is hired as a result of having to utilize the services of any such employment agency.

(2) Notwithstanding any provisions of this section to the contrary, it is not an unlawful discriminatory practice for the division of employment of the department of labor and employment to ascertain and record the age, sex, race, creed, color, or national origin of any individual for the purpose of making such reports as may be required by law to agencies of the federal or state government only. Said records may be made and kept in the manner required by the federal or state law, but no such information shall be divulged by said division or department to prospective employers as a basis for employment, except as provided in this subsection (2).

24-34-307. Complaint-hearing-procedure. (1) Any person claiming to be aggrieved by a discriminatory or unfair employment practice may, by himself or his attorney-at-law, make, sign, and file with the commission a verified written complaint in duplicate which shall state the name and address of the person,

employer, employment agency, labor organization, joint apprenticeship committee, or vocational school alleged to have committed the discriminatory or unfair employment practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The commission, a commissioner, or the attorney general may in like manner make, sign, and file such complaint.

(2) Any employer, labor organization, joint apprenticeship committee, or vocational school whose employees or members, or some of them, refuse or threaten to refuse to comply with the provisions of this part 3 may file with the commission a verified written complaint in duplicate asking the commission for assistance to obtain their compliance by conciliation or other remedial action.

(3) After the filing of a complaint, the coordinator or a commissioner shall make, with the assistance of the staff, a prompt investigation thereof, and if such investigating official determines that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate such discriminatory or unfair employment practice by conference, conciliation, and persuasion.

(4) The members of the commission and its staff shall not disclose the filing of a complaint, the information gathered during the investigation, or the endeavors to eliminate such discriminatory or unfair employment practice by conference, conciliation, and persuasion unless such disclosure is made in connection with the conduct of such investigation.

(5) In case of failure to satisfactorily settle a complaint by conference, conciliation, and persuasion, or in advance thereof, if in the opinion of the investigating official circumstances so warrant, he may issue and cause to be served a written notice, together with a copy of such complaint as the same may have been amended, requiring the person, employer, employment agency, labor organization, joint apprenticeship committee, or vocational school named in such complaint, referred to in this section as respondent, to answer the charges of such complaint in

writing within ten days after the date of such notice or within such extended time as the investigating official may allow.

(6) When the investigating official is satisfied that further endeavors to settle a complaint by conference, conciliation, and persuasion will be futile, he shall report the same to the commission. If the commission determines that the circumstances warrant, it shall issue and cause to be served a written notice requiring the respondent to answer the charges of such complaint at a hearing before the commission, a commissioner, or other person designated by the commission to conduct the hearing, referred to in this section as hearing examiner, at a time and place to be specified in such notice.

(7) The case in support of such complaint shall be presented at the hearing by one of the commission's attorneys or agents. The investigating official shall not participate in the hearing except as a witness, nor shall he participate in the deliberations of the commission in such case.

(8) The respondent may file a written verified answer to the complaint and appear at the hearing in person, or otherwise, with or without counsel, and submit testimony. In the discretion of the hearing examiner, a complainant may be allowed to intervene and present testimony in person or by counsel.

(9) When a respondent has failed to answer a complaint at a hearing as provided in this section, the commission may enter his default. For good cause shown, the commission may set aside an entry of default within ten days after the date of such entry. In the event the respondent is in default, the commission may proceed to hear testimony adduced upon behalf of the complainant. After hearing such testimony, the commission may enter such order as in its opinion the evidence warrants.

(10) The commission or the complainant shall have the power to reasonably and fairly amend any complaint, and the respondent shall have like power to amend his answer.

(11) The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity, but the right of cross-examination shall be preserved. The testimony taken at a hearing shall be under oath and shall be transcribed.

(12) If, upon all the evidence at a hearing, the commission finds that a respondent has engaged in or is engaging in any discriminatory or unfair employment practice as defined in this part 3, the commission shall state its findings of fact and shall issue and cause to be served upon such respondent an order requiring such respondent to cease and desist from such discriminatory or unfair employment practice and to take such affirmative action, including (but not limited to) hiring, reinstatement, or upgrading of employees, with or without back pay, the referring of applicants for employment by any respondent employment agency, the restoration to membership by any respondent labor organization, the admission to or continuation in enrollment in an apprenticeship program, on-the-job training program, or a vocational school, the posting of notices, and the making of reports as to the manner of compliance, as in the judgment of the commission will effectuate the purposes of this part 3.

(13) If, upon all of the evidence at a hearing, the commission finds that a respondent has not engaged in any such discriminatory or unfair employment practice, the commission shall state its findings of fact and shall issue and cause to be served an order on the complainant dismissing the complaint.

(14) The commission shall establish rules to govern, expedite, and effectuate the foregoing procedures and its own actions thereunder.

(15) Any complaint filed pursuant to this part 3 must be so filed within six months after the alleged discriminatory or unfair employment practice occurred.

24-34-308. Judicial review and enforcement. (1) Any complainant or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue an order, may obtain judicial review thereof, and the commission may obtain an order of court for its enforcement in a proceeding as provided in this section.

(2) Such proceeding shall be brought in the district court of the district in which is located the county wherein the alleged discriminatory or unfair employment practice which is the subject of the

commission's order was committed or wherein any respondent, required in the order to cease and desist from a discriminatory or unfair employment practice or to take other affirmative action, resides or transacts business.

(3) Such proceeding shall be initiated by the filing of a petition in such court and the service of a copy thereof upon the commission and upon all parties who appeared before the commission. Thereupon the commission shall file with the court a transcript of the record of the hearing before it. The court shall have jurisdiction of the proceeding and the questions determined therein and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified or setting aside the order of the commission in whole or in part.

(4) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

(5) Any party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereof, provided such party shows reasonable grounds for the failure to adduce such evidence before the commission.

(6) The findings of the commission as to the facts shall be conclusive if supported by substantial evidence.

(7) The jurisdiction of the court shall be exclusive and its judgment and order shall be final, subject to review as provided by law and the Colorado appellate rules.

(8) The commission's copy of the testimony shall be available to all parties for examination at all reasonable times, without cost, and for the purpose of judicial review of the commission's orders.

(9) The commission may appear in court by its own attorney.

(10) Unless otherwise directed by the commission or court,

commencement of review proceedings under this section shall operate as a stay of any order.

(11) Petitions filed under this section shall be heard expeditiously and determined upon the transcript filed, without requirement for printing. Hearings in the court under this part 3 shall take precedence over all other matters, except matters of the same character.

(12) If no proceeding to obtain judicial review is instituted by a complainant or respondent within thirty days from the service of an order of the commission pursuant to section 24-34-307, the commission may obtain a decree of the court for the enforcement of such order upon showing that respondent is subject to the jurisdiction of the commission and resides or transacts business within the county in which the petition for enforcement is brought.

Colorado Employment Security Act
(in relevant part)

C.R.S. 1973, 8-73-108. Benefit awards. (1) In the granting of benefit awards, it is the intent of the general assembly that the division at all times be guided by the tenet that unemployment insurance is for the benefit of persons unemployed through no fault of their own; and that each eligible individual who is unemployed through no fault of his own shall be entitled to receive benefits; and that every person has the right to leave any job for any reason, but that the circumstances of his separation shall be considered in determining the amount of benefits he may draw; and that certain acts of individuals are the direct and proximate cause of their unemployment and such acts may result in such individuals receiving fifty percent of full awards, a special award, an optional award, or no award.

(2) (a) A full award of benefits shall be the total amount of benefits computed under sections 8-73-102 and 8-73-104, adjusted when required by the provisions of paragraphs (b), (c), and (d) of this subsection (2).

(b) (I) An individual who receives a no award determination of benefits based upon a separation from work occurring at any time

from the beginning of the base period to the date of filing a claim or who is given a no award decision under subsection (6) (c) of this section shall be disqualified from receiving unemployment benefits under articles 70 to 82 of this title for a period of not less than thirteen nor more than twenty-five weeks beginning with the week in which the disqualifying act occurred, as determined by the division, according to the circumstances in each case; and the total benefits computed under section 8-73-104 shall be reduced by the number of weeks of disqualification multiplied by the claimant's weekly benefit amount; but no claimant's total amount of benefits as initially computed shall be reduced to less than one week of benefits because of a single disqualifying act.

(II) If a claimant is given a no award by reason of a separation from employment, the employer from whom the separation occurred shall not be charged for experience rating purposes with an amount of benefits paid to such claimant except those benefits which represent an amount equal to the difference between the total potential benefits chargeable to such employer and a sum equal to the number of weeks of disqualification multiplied by the claimant's weekly benefit amount.

(III) If the no award decision is based upon a discharge for misconduct connected with the claimant's last employment, the period of disqualification shall be for twenty-six weeks and the total benefit amount shall be reduced to zero, other provisions of this subsection (2) notwithstanding.

(c) A full award of benefits shall be reduced by fifty percent of the weekly benefit amount and total amount of benefits based on all wages earned prior to separation from a job which resulted in a determination of a fifty percent award.

(d) The payment of benefits provided by paragraphs (a), (b), and (c) of this subsection (2) to an individual separated from employment under the conditions set forth in subsection (8) of this section may be paid for weeks of unemployment occurring after said separation from employment only after said individual has complied with the requirements of subsection (8) of this section.

(3) Benefits payable under the provisions of this section shall be awarded, subject to other applicable provisions of articles 70 to 82

of this title, when the unemployment is the result of one or more of the causes provided for in subsections (4) to (8) of this section.

(4) **Full award.** An individual separated from a job for any of the reasons set forth as follows in this subsection (4) shall be given a full award of benefits if the reason and pertinent conditions related thereto are determined by the division to have existed; otherwise there shall be given a no award, fifty percent of full award, or a special award, as determined by the division in conformity with the facts:

(a) Laid off for lack of work;

(b) (I) The health of the worker is such that he must quit his employment and refrain from working for a period of time, but at the time of filing his claim he is able and available for work, or the worker's health is such that he must seek a new occupation, or the health of the worker, his spouse, or his dependent child is such that the worker must leave the vicinity of his employment; except that, if the health of the worker or that of his spouse or his dependent child has caused the separation from work, the worker, in order to be entitled to a full award, must have complied with the following requirements: Informed his employer of the condition of his health or the health of his spouse or dependent child prior to quitting his employment; substantiated the cause by a competent written medical statement issued prior to the date of quitting when so requested by the employer prior to the date of quitting or within a reasonable period thereafter; submitted himself or his spouse or his dependent child to an examination by a licensed practicing physician selected and paid by the interested employer when so requested by the employer prior to the date of quitting or within a reasonable period thereafter; and submitted himself, his spouse, or his dependent child to an examination by a licensed practicing physician selected and paid by the division when so requested by the division.

(II) In the event of an injury or sudden illness of the worker which would preclude notification of the employer prior to such occurrence, the failure of the worker to notify the employer prior to such occurrence will not in itself constitute a reason for the

denial of benefits if the worker has notified the employer at the earliest practicable time after such occurrence.

(III) Any physician who makes or is present at any examination required under these provisions shall testify as to the results of his examination; except that no such physician shall be required to disclose any confidential communication imparted to him for the purpose of treatment which is not necessary to a proper understanding of the case.

(c) Unsatisfactory or hazardous working conditions when so determined by the division. In determining whether or not working conditions are unsatisfactory for an individual, the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, the distance of the work from his residence, and the working conditions of workers engaged in the same or similar work for the same and other employers in the locality shall be considered. For the purpose of this paragraph (c), "hazardous working conditions" means such conditions, as are determined by the division to exist, that could result in a danger to the physical or mental well-being of the worker. In any such determination the division shall consider, but shall not be limited to a consideration of, the following: The safety measures used or the lack thereof and the condition of equipment or lack of proper equipment. No work shall be considered hazardous if the working conditions surrounding a worker's employment are the same or substantially the same as the working conditions generally prevailing among workers performing the same or similar work for other employers engaged in the same or similar type of activity.

(d) A substantial change in the worker's working conditions, said change in working conditions being substantially less favorable to the worker but requiring a worker to work a different shift, shall not be considered a substantial change in working conditions unless such requirement would be a violation of seniority rights which would entitle the worker to shift preferential, but in any such case the burden of proving such seniority rights shall rest upon the worker. No change in working conditions shall be considered substantial if it is determined by the division that the

conditions prevailing after the change are those generally prevailing for other workers performing the same or similar work.

(e) Unreasonable reduction in the worker's rate of pay as determined by the division. In determining whether or not there has been an unreasonable reduction in the worker's rate of pay, the division shall consider, but shall not be limited to a consideration of, whether or not the reduction in pay was applied by the employer to all workers in the same or similar class or merely to this individual, the general economic conditions prevailing in the state, the financial condition of the employer involved, and whether or not the reduction in wage was agreed to by other workers employed in the same or similar work.

(f) Accepting a better job. In determining whether or not the job accepted is a better job, the division of employment shall consider, but shall not be limited to a consideration of, the rate of pay, the hours of work, and the probable permanency of the job quit as compared to the job accepted; the cost to the worker in getting to the job quit and to the job accepted; the distance from the worker's place of residence to the job accepted in comparison to the distance from the worker's residence to the job quit; and whether or not such worker acted as a reasonably prudent individual would have acted under the same or similar conditions. In addition to the above stated conditions, no job shall be considered better unless it is offered to and accepted by the worker prior to the date of his quitting and meets the following conditions:

(I) It does not have a definite termination date of less than one year, and it lasts at least ninety calendar days from the first date of employment on the job accepted unless sooner terminated under conditions of which, in the judgment of the division, the worker had no knowledge at the time he accepted the job and over which he had no control, but a job shall not be considered better if it lasts less than ninety days due to a lack of work, the absence of said knowledge and control notwithstanding.

(II) The ninety-day and one-year provisions set forth in subparagraph (I) of this paragraph (f) shall not apply to a construction worker who quits a construction job within thirty days immediately

preceding the termination date of the job quit and who, at the time of his quitting, has been offered and has accepted another construction job prior to the date of quitting, which other job offers employment for a longer period of time than remained available on the job quit unless the job accepted was terminated by a contract cancellation.

(III) For the purpose of this paragraph (f), the job accepted shall be considered to exist only for so long as the worker is actually in employment.

(IV) For purposes of this paragraph (f), leaving a job to comply with a condition of apprentice assignment to an employer, which condition was imposed to meet the conditions of a joint apprenticeship or other apprenticeship program and is in accordance with requirements for programs registered with the federal government and in conformity with the rules of the Colorado apprenticeship council, constitutes accepting a better job.

(g) Being given the choice by his employer between being terminated, furloughed, or laid off, and replacing another worker, and the worker has elected to accept a termination, furlough, or layoff;

(h) Quitting employment because of a violation of the employment contract by the employer; except that before such quitting the worker must have exhausted all remedies provided in such contract for the settlement of disputes before quitting his job;

(i) Being discharged from employment without the employer informing either the worker or the division, after a request from the division as to the reason for the discharge;

(j) Being physically or mentally unable to perform the work or unqualified to perform the work as a result of insufficient educational attainment or inadequate occupational or professional skills;

(k) Refusing with good cause to work overtime without reasonable advance notice. Good cause as used in this paragraph (k) shall be restricted to compelling personal reasons affecting either the worker or his immediate family.

(l) Being instructed or requested to perform a service or commit an act which is in violation of an ordinance or statute;

(m) Involuntary retirement in accordance with company policy or at the volition of the employer;

(n) Quitting employment under conditions which would not have resulted in a denial of benefits under the provisions of paragraph (x) of subsection (6) of this section.

(5) **Fifty percent of full award.** Fifty percent of a full award shall be one-half the weekly benefit amount and for one-half the total benefit amount the claimant would otherwise have been entitled to receive as computed under sections 8-73-102 and 8-73-104 when the unemployment is the result of one or more of the causes provided in the following schedule:

(a) Violation of a company rule which did not result or could not have resulted in serious damage to the employer's property or interests, or did not or could not have endangered the life of the worker or other employees;

(b) Under conditions indicating that the claimant contributed to, but was not wholly responsible for, incompatibility with a supervisor or fellow employees;

(c) Under conditions which do not conclusively indicate that there was either a voluntary separation at the worker's instigation or discharge at the employer's volition and that the responsibility for the separation is shared by the worker and the employer.

(6) **No award.** An individual separated from a job or who refuses to accept suitable work or refuses a referral to suitable work for any of the following reasons shall be given a no award of benefits if the reason and pertinent conditions related thereto are determined by the division to have existed; otherwise he shall be given a full award, fifty percent of full award, or special award, as determined by the division in conformity with the facts:

(a) Quitting employment because of dissatisfaction with prevailing rates of pay, standard hours of work, standard working conditions, or working conditions which generally prevail for other workers performing the same or similar work, regularly assigned duties, or opportunities for advancement;

(b) Quitting employment because of dissatisfaction with supervisor with no evidence to indicate that the supervision is other

than that reasonably to be expected in the proper performance of work;

(c) Quitting to marry, irrespective of whether or not such marriage occurs subsequent to the separation from employment;

(d) Moving to another area except for health reasons or moving to accept a better job;

(e) Quitting for no apparent reason;

(f) Lack of transportation. Transportation shall be the responsibility of the worker; if, however, in the opinion of the division, it would have been unreasonable to require the worker to continue in employment with his same employer at a new job site substantially less accessible or substantially more distant from the worker's residence than the site at which he had worked, benefits shall not be denied because of his refusal to continue in employment at the new site.

(g) Quitting to seek other work, not having first accepted an offer of other employment, or quitting to accept other employment which could not be construed as a better job as provided in subsection (4) (f) of this section;

(h) Insubordination such as: Deliberate disobedience of a reasonable instruction of an employer or his duly authorized representative; refusal or failure to obtain or renew licenses which are necessary to permit the claimant to perform his job; failure to keep in good standing with the union because of nonpayment of dues; repeated acts of agitation against employer working conditions, pay scale, policies, or procedures; except that orderly action on the part of an employee or through union negotiation shall not be so considered if such action does not interfere with work performance;

(i) Violation of a statute or of a company rule which resulted or could have resulted in serious damage to the employer's property or interests, or could have endangered the life of the worker or other employees, such as: Mistreatment of patients in a hospital or nursing home; serving liquor to minors; selling prescription items without prescriptions from licensed doctors; profane or obscene language after warnings; immoral conduct which has an effect on worker's job status; divulging of confidential information

which resulted or could have resulted in damage to the employer's interests; failure to observe conspicuously posted safety rules; intentional falsification of expense accounts, inventories, or other records or reports; or removal or attempted removal of employer's property from the premises of the employer without proper authority;

(j) Off-the-job use of not medically prescribed intoxicating beverages or narcotics to a degree resulting in interference with job performance;

(k) On-the-job use of not medically prescribed intoxicating beverages or narcotics;

(l) Incarceration for violation of law or loss of license essential to job performance through law violation;

(m) Theft;

(n) Assaulting or threatening to assault under circumstances such as to cause a reasonably emotionally stable person to become concerned as to his physical safety;

(o) Willful neglect or damage to an employer's property or interests;

(p) Rudeness, insolence, or offensive behavior of the worker not reasonably to be countenanced by a customer, supervisor, or fellow worker;

(q) Careless or shoddy work. In determining whether or not work has been performed in a careless or shoddy manner, the division shall consider the length of time the worker has been performing the work satisfactorily, and no work shall be considered careless or shoddy that comes within the areas of reasonable mistakes and errors normally made by workers engaging in the same or similar work.

(r) Failure to properly safeguard, maintain, or account for the employer's property when this obligation is an essential part of the job;

(s) Going hunting, engaging in sports, taking unauthorized vacations, or failing to return to work as scheduled after an authorized vacation or other leave of absence unless such failure to return to work was caused by circumstances which would result in a full award under the provisions of this section;

(t) Refusal to work a different shift when no violation of seniority rights, as provided in paragraph (d) of subsection (4) of this section, is involved;

(u) Refusal to accept transfer to another department which does not involve a substantial change in working conditions or a substantial loss in wages;

(v) Quitting under conditions involving personal reasons which do not, under other provisions of this section, provide for an award of benefits;

(w) Returning to school;

(x) (I) The refusal of suitable work or refusal of referral to suitable work at any time from the beginning of the base period to the time of the filing of a claim. In determining whether or not any work is suitable for an individual, the degree of risk involved to his health, safety, and morals; his physical fitness and prior training; his experience and prior earnings; his length of unemployment and prospects for securing work in his customary occupation; and the distance of the available local work from his residence shall be considered. Notwithstanding any other provisions of articles 70 to 82 of this title, no work shall be deemed suitable and benefits shall not be denied under articles 70 to 82 of this title to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(B) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(C) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(II) An award shall not be denied to an individual more than once for failure to apply for or to accept the same or a similar position with the same employer.

(III) An award shall not be denied because an individual quits employment to participate in a student-learner program of occupational education under the auspices of a public school, junior

college, community and technical college, federally funded work-training program, or proprietary school approved by the state board for community colleges and occupational education.

(7) (a) **Optional award.** If, in the administration of articles 70 to 82 of this title, the division of employment determines that a claim for benefits is not specifically covered under other provisions of this section, the division shall grant a full award, fifty percent of full award, or special award or make a determination of no award. The general assembly determines that, by reason of the wide variance of facts and the conditions surrounding the causes of separation from work, the division shall include the following causes for separation from work under optional award: Tardiness, absenteeism, garnishment, constructive criticism, abuse of coffee break privileges, overstaying of lunch periods, sleeping on the job, and loafing on the job.

(b) In its consideration of granting any optional award, the division shall consider, but shall not be limited to a consideration of, whether or not:

(I) The discharge was caused by a single instance or whether there were several instances;

(II) The claimant had been previously warned or whether the employer had condoned similar infractions;

(III) The act or failure to act on the part of the claimant interrupted the work schedule of the employer or endangered the health or safety of the claimant or others;

(IV) Other employees were unable to work because of the act or failure to act on the part of the claimant;

(V) The claimant notified the employer in advance;

(VI) The act or failure to act on the part of the claimant was unavoidable or was caused by the illness of the claimant or a member of his immediate family;

(VII) The employer had an established and published or promulgated policy;

(VIII) The claimant's act or failure to act resulted in damage to the employer's property or interest or in a distinguishable difference in the quantity or quality of work performed;

(IX) The claimant had kept the employer informed of his status during his absence;

(X) The criticism which resulted in separation was actually of a constructive nature and given in a considerate manner.

(8) **Special award.** A worker who becomes separated from employment under conditions enumerated in this subsection (8) shall be entitled to a special award of benefits. A worker who has received a special award of benefits shall not be entitled to benefit payments until, subsequent to the separation which caused the special award, he has worked for thirteen weeks in full-time employment in Colorado or full-time employment outside Colorado which was covered by an unemployment insurance law, or a combination thereof which totals thirteen full weeks, and is otherwise eligible. The conditions are as follows:

(a) Marital, parental, filial, or domestic obligation;

(b) To engage in self-employment;

(c) Under conditions reflecting a withdrawal from active attachment to the labor force;

(d) Notwithstanding other provisions of this subsection (8), awards to workers who are separated from a job because of pregnancy shall be made in accordance with the following provisions:

(I) If involuntarily separated from a job because of pregnancy, the worker shall be awarded a full award of benefits if otherwise eligible until thirty days prior to the expected termination of pregnancy, but, if a pregnant worker has been separated prior to the termination of her pregnancy according to the provisions of a reasonable rule of the employer providing for the separation of pregnant workers, such worker shall not be entitled to benefits prior to the termination of her pregnancy.

(II) If voluntarily separated by reason of her pregnancy, such worker shall not be entitled to benefits prior to the termination of her pregnancy.

(III) If she is the sole support of her child, children, or invalid husband, she shall be granted a full award of benefits after thirty days subsequent to the termination of her pregnancy for each remaining week of her benefit year wherein she is the

sole support, if otherwise eligible, and has wage credits remaining.

(IV) If she is not the sole support of her child, children or invalid husband, no award until she has reentered the labor market and has worked for thirteen weeks subsequent to the termination of her pregnancy in full-time employment in Colorado or in full-time employment outside Colorado which was covered by an unemployment insurance law, or a combination thereof which totals thirteen full weeks, then, full award if the worker is otherwise eligible and has wage credits remaining.

C.R.S. 1973, 8-74-102. Initial determination-prompt payment of benefits. (1) An individual designated by the division of employment, referred to in this article as the "deputy", shall promptly examine the claim and, on the basis of the facts found by him, shall determine whether or not such claim is valid and, if valid, the earliest week with respect to which benefits may commence, if determinable, the weekly benefit amount payable, and the maximum duration thereof.

(2) The deputy shall promptly notify the claimant and any other interested party of the decision, including the earliest week with respect to which benefits may commence, the weekly benefit amount and the maximum duration thereof, and the reasons for the decision. The deputy, for good cause, may reconsider his decision and, if his original decision is amended, shall promptly notify the claimant and such other interested parties of his amended decision and the reasons therefor. Unless the claimant or any such interested parties, within eleven calendar days after either the delivery of the deputy's notification or after such notification was mailed to his last known address, whichever occurs first, files an appeal from such decision, such decision shall be final, and benefits shall be paid or denied in accordance therewith. A mailed notice shall be deemed served on the date of mailing. If an appeal is duly filed, the division shall give notice thereof to the parties entitled to notice of the original determination.

(3) Notwithstanding any other provision of this article, benefits shall be paid promptly in accordance with a determination or redetermination under this article upon issuance of such determination, redetermination, or decision, as the case may be, regardless of any appeal or petition to review which may have been taken from such determination, redetermination, or decision has been modified or reversed by a subsequent redetermination or decision, in which event benefits shall be paid or denied for those weeks of unemployment which occur thereafter in accordance with such modifying or reversing redetermination or decision, but, if such decision is finally reversed, no employer's experience rating account shall be charged with benefits so paid.

8-74-104. Appeals. Unless an appeal is withdrawn, a referee, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the deputy. If an appeal involves a question as to whether services were performed by a claimant in employment or for an employer, the referee shall give special notice of such issue and of the pendency of the appeal to the employing unit and to the division, both of whom shall thenceforth be parties to the proceeding and be afforded a reasonable opportunity to adduce evidence bearing on such issue. The parties shall be duly notified of such referee's decision together with his reasons therefor, which shall be deemed to be the final decision of the division unless, within eleven days after the date of notification or mailing of such decision, further appeal is initiated pursuant to section 8-74-105.

8-74-105. Commission review. The commission on its own motion may affirm, modify, or set aside any decision of a referee on the basis of the evidence previously submitted in such case or direct the taking of additional evidence. The commission shall permit any of the parties to initiate further appeals before it. The commission shall permit such further appeal by the deputy if the decision of the deputy has been overruled or modified by a referee. The commission may remove to itself or transfer to another referee the proceedings on any claim pending before a referee. Any

proceeding so removed to the commission shall be heard in accordance with the requirements of section 8-74-104 by the commission or, in the absence or disqualification of a partisan member, by the impartial member acting alone. The commission shall promptly notify the interested parties of its findings and decision.

8-74-108. Appeal to courts. (1) Any decision of the commission shall be final unless a petition to review same is filed by an interested party. Every petition for review shall be in writing and shall specify in detail the particular errors and objections. The petition must be filed within ten days after the entry of the decision of the commission unless further time is granted by the commission within said ten days, and, unless so filed, said decision shall be final. All parties in interest shall be given due notice of any decision of the commission, and said period of ten days shall begin to run only after such notice, and the mailing of a copy of the said decision addressed to the last known address of any party in interest shall be sufficient notice.

(2) No action, proceeding, or suit to set aside, vacate, or amend any findings or decision of the commission, or to enjoin the enforcement thereof, shall be brought unless the plaintiff has first applied to the commission for a review as provided in section 8-74-105.

8-74-109. Court review. Such action, proceeding, or suit must be commenced within twenty days after the final findings or decision of the commission, and any party aggrieved thereby may secure judicial review thereof by commencing an action in the court of appeals for the review of the commission's findings or decision in the same manner as reviews are now provided by law in workmen's compensation cases. The commission, in its discretion, may also certify to such court questions of law involved in any of its decisions. In any judicial proceeding under this article, the findings of the commission as to the facts, if supported by substantial evidence and in absence of fraud, shall be conclusive. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the "Workmen's Compensation Act

of Colorado". If the supreme court reviews the judgment of the court of appeals, such review shall be limited to a summary review of questions of law. Any such action shall be advanced upon the calendar of the supreme court, and a final decision shall be rendered within sixty days after the supreme court grants further appellate review.

Title VII of the Civil Rights Act of 1964 (in relevant part)

42 U.S.C., § 2000e-5. (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission,

its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

CERTIFICATE OF SERVICE

I hereby certify that I have in compliance with United States Supreme Court Rule 33, para. 3(b) this 5th day of Nov., 1975, deposited three copies of the foregoing Petition for Writ of Certiorari in the United States Mails, first class postage prepaid and addressed to:

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Mary J. Mullarkey

MOTION FILED

JAN 14 1976

75-682

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. A–261

COLORADO CIVIL RIGHTS COMMISSION and
RAYMOND WENDELL HOLMES,

Petitioner

v.

COLORADO SPRINGS COACH CO., and
BYRON COWART,

Respondents

Motion for Leave to File Brief Amicus Curiae and Brief for the International Association of Official Human Rights Agencies as Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE INTERNATIONAL ASSOCIATION OF OFFICIAL HUMAN RIGHTS AGENCIES AS AMICUS CURIAE

The International Association of Official Human Rights Agencies (IAOHRA) hereby respectfully moves for leave to file a brief amicus curiae in this case in support of petitioners, as provided in Rule 42 of the Rules of this Court. The consent of the attorneys for the petitioners has been obtained. The consent of the attorney for the respondents was requested, but was refused.

IAOHRA is an umbrella organization for 156 state and local civil rights agencies throughout the country, and 500 constituent state and local civil rights agencies. The Colorado Civil Rights Commission is affiliated with IAOHRA. The basic issue in this case is of interest to IAOHRA because it has a broad effect on all civil rights agencies which are charged by state statute or local ordinance with authority to hear and adjudicate charges of illegal employment discrimination. That issue is the extent to which a state court may apply the doctrine of res judicata to prevent civil rights agencies from hearing and adjudicating complaints for illegal employment discrimination. As a spokesperson for these agencies, IAOHRA desires the opportunity to present its views on this matter to the court.

Petitioners will emphasize the particular facts of their case. In the brief tendered with this motion, IAOHRA emphasizes some more general implications of this case and presents considerations that may place the issues here in a broader context. This, we believe, will aid the Court in perceiving the importance of this case for properly determining the role of state and local human rights agencies

throughout the country.

Respectfully submitted,

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by .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

A No. A-261

COLORADO CIVIL RIGHTS COMMISSION AND
RAYMOND WENDELL HOLMES, PETITIONERS

v.

COLORADO SPRINGS COACH CO., AND
BYRON COWART, RESPONDENTS

Amicus Curiae Brief in Support of
Petition for a Writ of Certiorari

AMICUS CURIAE BRIEF

LOWER COURT OPINION

The opinions of the Industrial Commission of Colorado, the Colorado Civil Rights Commission, and the District Court of the County of El Paso for the State of Colorado are unreported. The opinion of the Colorado Court of Appeals is

reported at ___ Colo. App. ___, 536 P.2d. 837, and is unofficially reported at 9 EPD Paragraph 10,004 (C.C.H. Publication "Employment Practices Decisions")

INTEREST OF THE AMICUS CURIAE

The interest of the International Association of Official Human Rights Agencies (IAOHRA) arises because it is an umbrella organization consisting of 156 member agencies throughout the country, all of whom are charged with the enforcement of a fair employment practices (FEP) law similar to that in Colorado. The issues raised in this case are not isolated to Colorado, but have implications for all state and local civil rights agenices.

Precedent established by the decision of the Colorado Court of Appeals could substantially reduce the jurisdiction of state and local civil rights agencies and reduce their ability to effectively eliminate illegal discrimination in employment.

Because IAOHRA is convinced of the importance of securing equal employment opportunities for all and because of the role of state and local civil rights agencies in settling equal opportunity controversies quickly and economically, the interest of amicus is that jurisdictional powers of these agencies not be improperly curtailed.

AMICUS CURIAE AUTHORITY

IAOHRA has obtained the consent of attorneys for the plaintiff to file a brief amicus curiae. The consent of attorneys for the defendant has been requested, but was refused. Amicus curiae authority is sought by a motion for leave to file amicus curiae which is attached with this brief.

QUESTION PRESENTED

Whether a state court can constitutionally bar a state civil rights commission authorized by statute to hear employment discrimination complaints from hearing such a complaint if it is brought by a person who has previously had a ruling upon an action brought before some other agency of the state in which the issue of discrimination arising from the same incident as the discrimination complained of before the civil rights commission was ruled upon.

STATUTES INVOLVED

The statutes primarily involved are the Colorado Antidiscrimination Act of 1957, C.R.S. 1973, 24-34-301 et. seq., the Colorado Employment Security Act, C.R.S. 1973, 8-70-101 et. seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq.

STATEMENT OF THE CASE

The statement set forth in Petitioner's Brief is adopted by Amicus and incorporated herein by reference.

REASONS FOR GRANTING A WRIT OF CERTIORARI

The "Reason for Granting the Writ" as recited in Petitioner's brief is adopted by Amicus and incorporated herein by reference.

In addition, Amicus urges this Court to grant a Writ of Certiorari for the following reasons:

This decision by the Colorado Court of Appeals will make relief from racial discrimination in employment slower and more difficult. It will diminish the authority and ability of state or local human rights agencies to settle complaints of employment discrimination, and will place a greater burden on already overloaded federal agencies and courts.

ARGUMENT

The decision of the Colorado Court of Appeals appears to deny jurisdiction to state civil rights agencies over employment discrimination complaints brought by persons who have previously had a hearing and final ruling by another administrative agency with narrower remedial powers and less comprehensive procedural requirements than the civil rights commission. The Colorado Civil Rights Commission is empowered to receive and investigate employment discrimination complaints, C.R.S. 1973, 24-34-305, to attempt to conciliate, and to hold hearings if conciliation fails. The complainant at these hearings is represented by a Commission attorney. Testimony is given under oath and transcribed, and the right of cross examination is preserved. C.R.S. 1973, 24-34-307. The Commission may issue an order requiring the respondent to cease and desist from discriminatory action and may order affirmative action including hiring, reinstatement or upgrading of employees, with or without backpay, as well as other relief. C.R.S. 1973, 24-34-307(12). Judicial review is available in the appropriate state district court. C.R.S. 1973, 24-34-308.

The procedural requirements of the Industrial Commission are less comprehensive. The Industrial Commission does not provide counsel for the claimant, and court review is in a summary manner in the court of appeals on an accelerated calendar. C.R.S. 1973, 8-74-109. Regulations for administrative

review of disputed claims are promulgated by the Industrial Commission and are not required to conform to common law or statutory rules of evidence and technical rules of procedure. C.R.S. 8-74-106 The primary question before the Industrial Commission is whether persons became unemployed "through no fault of their own". C.R.S. 1973, 8-73-108

If with these simplified procedures a decision rendered by a body such as the Colorado Industrial Commission has a res judicata effect upon a later hearing by the Colorado Civil Rights Commission on the issue of racial discrimination, it appears that decisions by other administrative agencies could also have that effect. The decision of the Colorado Court of Appeals provided no guidelines by which a person complaining of racial discrimination in the future may rationally determine whether due process and equal protection of law allows him to bring a claim before an administrative agency without risking the loss of his right to seek relief from racial discrimination through the state or local civil rights commission.

A consequence of this uncertainty is that plaintiffs will be encouraged to rely less on state and local civil rights agencies in employment discrimination disputes and will rely primarily on administrative and judicial remedies provided in Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et. seq. Administrative action by the Equal Employment Opportunity Commission is not barred under Title VII because of state or local findings and orders, 42 USC §2000e 5(b). Nor is federal court action precluded because of an Equal Employment Opportunity Commission finding of no reasonable cause to believe that Title VII has been violated. 42 USC §2000e 5(f). Alexander v. Gardner-Denver, 415 U.S. 36,48 n.8 (1974).

Although Title VII requires that complaints filed with the Equal Employment Opportunity Commission be deferred for sixty days to state or local agencies if a state or local law exists which prohibits the unlawful practice alleged, 42 USC §2000e, the capacity of a state or local authority to actually order relief will influence both the seriousness with which a plaintiff is likely to pursue a claim at that level and the effectiveness of local or state processes.

In Colorado and elsewhere much of the work of the civil rights agency is to arrange conciliation without a hearing or court action. Parties are encouraged to reach a conciliation, in part, by the fact that the civil rights commission may hold a public hearing and issue an order if conciliation is unsuccessful. To the extent that state or local commissions are perceived by parties to a complaint to lack authority to issue orders, parties will not be motivated to negotiate seriously. The conciliation process will be compromised and the dispute will probably be pushed into the federal system.

When the real ability of state or local agencies to resolve employment discrimination cases is reduced in this manner, the sixty day deferral period required by Title VII will tend to operate as a procedural roadblock to final resolution rather than as a mechanism to assure an opportunity for quick and inexpensive local resolution of employment discrimination disputes. Since Congressional policy against racial discrimination is of highest priority this result ought to be avoided.

CONCLUSION

This Court should grant a writ of certiorari in this case so that it may clarify circumstances under which a state or local civil rights commission may grant relief to a complainant alleging racial discrimination in employment.

Respectfully submitted,

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January, 1976

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. 75-682

COLORADO CIVIL RIGHTS COMMISSION
and RAYMOND WENDELL HOLMES,

Petitioners,

v.

COLORADO SPRINGS COACH CO., and
BYRON COWART,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. (75-682)

COLORADO CIVIL RIGHTS COMMISSION
and RAYMOND WENDELL HOLMES,

Petitioners,

v.

COLORADO SPRINGS COACH CO., and
BYRON COWART,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

OPINION BELOW

The opinion of the Colorado Court of Appeals is reported at _____ Colo. App. _____ , 536 P.2d 837 (Petitioners' Brief, Appendix D).

JURISDICTION

Respondents contend that this Court is without proper jurisdiction to grant Petition for Writ of Certiorari because: A. Petitioner's XIV Amendment Constitutional rights were not

specifically set up or claimed in the state courts. B. Adequate and independent non-federal grounds existed for the state court decision of res judicata. C. The issues are not ripe for decision. D. The issues are moot with respect to Respondent, Colorado Springs Coach Company, and E. Co-Petitioner, Colorado Civil Rights Commission, has no standing to pursue this case on appeal.

Petitioners allege jurisdiction of this Court under 28 U.S. 1257 (3). (Petitioners' Brief at 2). Petitioners have not alleged, however, that any Colorado statute is repugnant to the Constitution, treaties or laws of the United States. Petitioners' jurisdiction allegation, therefore, must rest upon a title, right, privilege or immunity specially set up or claimed under the Constitution of the United States.

A. *Petitioner, Holmes', XIV Amendment Constitutional rights were not specially set up or claimed in the state courts.*

No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil v. Vermont*, 144 U.S. 323, 331; *Barbour v. Georgia*, 249 U.S. 454, 460; *Whitney v. California*, 274 U.S. 357, 360, 362, 380. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adhers to it in cases from state courts. See Brandeis, Jr. concurring in *Whitney v. California*, supra, 380.

This Court has held that federal constitutional issues must be specifically set up or claimed prior to a decision issued in the case by the state supreme court. *Spies v. Illinois*, 123 U.S. 131 (1887); *Winona and St. Peter Land Company v. Minnesota, (2)*,- 159 U.S. 540 (1895). Federal constitutional issues raised before this court for the first time on review of state court decisions will

not be decided. *Tacon v. Arizona*, 410 U.S. 351 (1973); *Cardinale v. Louisianna*, 394 U.S. 437, (1969); *Monks v. New Jersey*, 398 US 71 (1970).

The issue whether a federal question was sufficiently and properly raised in the state courts is, itself, ultimately a federal question, as to which this Court is not bound by a decision of the state courts. *Street v. New York*, 394 U. S. 576 (1969). In order to vindicate this Court's jurisdiction to deal with this particular issue, it must inquire whether that question was presented to the state courts in such a manner that it was necessarily decided by the state supreme court. *Street*, supra, at 581.

This Court has stated that when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *Street*, supra, 582.

In the instant case, the Colorado Supreme Court did not issue a decision, but merely denied certiorari to hear the case. (Petitioners' Brief at 5.) The Colorado Court of Appeals was the highest state court to issue an opinion in this case, (Petitioners' Brief at 5) but there the court issued its opinion based upon a Colorado Supreme Court ruling as precedent. (Petitioners' Brief, Appendix D, at 34.) There was no discussion as to federal constitutional rights. This case is not the same, therefore, as that of- *Colorado Antidiscrimination Commission, et al, v. Continental Airlines, Inc.*, 372 U. S. 714 (1963), where the Colorado Supreme Court interpreted its own statutes in light of, and in relation to, federal law, nor is this case the same as that of *Department of Motor Vehicles of the State of California v. Rios*, 410 U. S. 425 (1973), where the California Supreme Court apparently interpreted its own statutes in light of the California Constitution or the United States Constitution, or both.

In *De Backer v. Brainard*, 396 U. S. 28 (1969) the appellant did not make his constitutional claim before the trial court judge; he raised the issue on appeal to the state district court but that court did not pass on the issue; he did not press the district court's failure to consider that issue in his appeal to the state supreme court, and made only passing reference to the issue in his brief to that court. The opinion of that state supreme court did not pass on the issue, or ever refer to the contention. This Court, therefore, refused to rule on the issue. *De Backer*, supra, at 32.

In *Cardinale v. Louisianna*, supra, this Court explained its reasoning for refusing to hear a federal constitutional issue raised for the first time on appeal from the state supreme court:

> ". . . questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though states are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 US 92 (1966) . . . 'they should be given the first opportunity to consider them.' "

Although no particular form of word or phrases is essential to raise a federal constitutional issue, ". . . it is essential that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time."- *Street v. New York*, supra, at 584. In the instant case, Petitioners did not raise the issue of violation of due process or discrimination on the basis of wealth under the XIV Amendment to the United States Constitution at any time to any of the

Colorado state courts. It is true, that in its application for writ of certiorari from the Colorado Supreme Court, the Petitioners did complain of Petitioner, Holmes, being made to have an "unconscionable choice" as to his pursuit or remedies. (Petitioners' Brief at 4, 5.) Respondents contend, however, that this was not a sufficient means of bringing a federal constitutional issue to the attention of the supreme court with fair precision.

Because Petitioners failed to specially set up or claim a title, right, privilege or immunity under the United States Constitution by making a timely assertion before the state courts, this Court should find that it has no jurisdiction to hear Petitioners' constitutional arguments on appeal.

B. *Adequate and independent non-federal grounds existed for the state court decision of res judicata.*

This Court will not review a state court's decision resting on an adequate and independent non-federal ground. *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945). The Colorado district court found that the principle of res judicata should be applied in the instant case because to allow Petitioner, Holmes, to prosecute a claim before another state agency, under the same evidence, would tend to create an impossible situation for the courts. (Petitioners' Brief, Appendix C, at 30.)

The Colorado Court of Appeals, upon review of the instant case on appeal from the district court, cited language in a previous Colorado Supreme Court decision: Umberfield v. School District No. 11 _____ Colo. _____, 552 P.2d 730 (1974), wherein the Colorado Supreme Court applied the doctrine of res judicata on the grounds that:

> *". . . To hold otherwise could result in an anomalous situation where the same reviewing court would be compelled to affirm opposite results of the two administrative bodies." (Petitioners' Brief, Appendix D, at 35.)*

Preventing anomalous and confusing decisions with regard to its own state agencies, is an adequate and independent non-federal ground for state court decisions.

Because adequate and independent non-federal grounds were the basis of the judgments of the state courts in the instant case, this Court should find that it has no jurisdiction to hear Petitioners' constitutional arguments on appeal.

C. *Petitioner, Holmes', constitutional issues are not ripe for decision.*

Where a party alleges that he has been denied a constitutional right under Title VII of the Civil Rights Act of 1964, in the area of employment discrimination, he is entitled to pursue a separate course of action under that federal statute in federal district court, 42 USC 2000e-5(e). Petitioner, Holmes, has filed a claim with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964. (Respondents' Appendix I, at.) As this Court stated in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947):

> ". . . the power of courts and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough . . ." *United Public Workers*, supra at 89-90.

Because Petitioners' allegations of denial of constitutional rights are not ripe, this Court should deny jurisdiction to hear such allegations in this appeal.

D. *The issues are moot with respect to Respondent, Colorado Springs Coach Company, and with respect to Petitioner, Holmes', allegations of denial of federal constitutional rights.*

Federal courts are without power to decide questions that cannot affect the rights of litigants in a case before them. *North Carolina v. Rice*, 404 U.S. 244 (1971); *DeFunis v. Odegaard*, 416 U.S. 312 (1974). For purposes of federal court jurisdiction, an action is rendered moot if it can be said with assurance that there is no reasonable expectation that the alleged wrong will be repeated. *United States v. W. T. Grant Company*, 345 U.S. 69 (1953); *DeFunis v. Odegaard*, supra. With regard to the question of a case's mootness, the usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *Roe v. Wade*, 410 U.S. 113 (1973); *DeFunis v. Odegaard*, supra.

Since Respondent, Colorado Springs Coach Company, at the time Petitioner, Holmes, was granted his award by the Civil Rights Commission, had ceased its operation of the city bus lines, (Petitioners' Brief, Appendix C at 31) and was only authorized by the Public Utilities Commission to operate charter trips outside the city, and that at the time of the hearing before the district court, was in the process of and thereafter did cease operation even under its P.U.C. Charter authority and was no longer making any disposition whatsoever as to employment of individuals, it can be said with assurance that there is no reasonable expectation that the alleged wrong will be repeated.

Because of Petitioners' allegations of denial of federal constitutional rights are moot, this Court should deny jurisdiction to hear such allegations on appeal.

E. *Co-Petitioner, Colorado Civil Rights Commission has no standing to pursue this case on appeal.*

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U. S. 150 (1970), this Court held that, to show proper standing, the petitioner must first allege some type of injury in fact and second, the injury must be arguably within the zone of interests to be protected and regulated by the statute or constitutional guarantee in question.

Petitioner, Colorado Civil Rights Commission, has no injury in fact insofar as having such a personal stake. Petitioners's injury in fact must be such an injury as to have a personal stake in the outcome of the controversy to assure the concrete adverseness requisite to a proper presentation of issues for adjudication.- *Baker v. Carr*, 369 U.S. 186 (1962).

Petitioners have alleged that Petitioner, Holmes, and others similarly situated will be denied various XIV Amendment guarantees if a decision of res judicata is found. (Petitioners' Brief at 6.) Respondents do not dispute that Petitioner, Holmes, has a personal stake in the outcome of the controversy. Neither do Respondents dispute that Petitioner, Holmes, is arguably within the zone of interests to be protected and regulated by the alleged violations of the XIV Amendment guarantees.

Respondents do dispute, however, that the Colorado Civil Rights Commission has been either injured in fact, or that it is arguably within the zone of interests to be protected and regulated by the XIV Amendment. The most that can be said is that if this court finds that a Colorado Industrial Commission decision is res judicata with regard to a subsequent Colorado Civil Rights Commission decision, the Colorado Civil Rights Commission will be unable to maintain its current case load. The Respondents contend that such an occurrence is neither an injury in fact, nor is the maintenance of the case load of the petitioning Commission at its current level arguably within the zone of interests to be protected and regulated by the XIV Amendment to the United States Constitution.

This Court has held that "to have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it." *Board of Regents v. Roth*, 408 U.S. 574, 577 (1972). If this Court finds that a Colorado Civil Rights Commission has sufficient standing to pursue this case on appeal as a co-petitioner, then the maintenance of the Colorado Civil Rights case load is a legitimate claim of entitlement under, and is

arguably within the zone of interests to be protected and regulated by, the XIV Amendment to the United States Constitution. Respondents contend that the maintenance of a state administrative agency's work load is not even remotely within the zone of interests to be protected and regulated by the XIV Amendment.

For the above reasons, this Court should find that the Colorado Civil Rights Commission has no standing to pursue this case on appeal.

RESTATEMENT OF THE CASE

Petitioner, Raymond Wendell Holmes, was first employed by Respondent, Colorado Springs Coach Company, in July of 1969. In March of 1970, Petitioner, Holmes, voluntarily terminated his employment. In August of 1970, Petitioner was rehired by Respondent until February 15, 1971, when Petitioner's employment was terminated for "failure to work assigned runs." Subsequent to his termination, Holmes filed a claim with the Industrial Commission of Colorado (serving ex-officio as the Unemployment Compensation Commission of Colorado) for unemployment compensation benefits. The Commission's deputy denied Holmes' claim. Holmes then took an appeal, the notice of which (R Appendix II) referred to termination because of racial discrimination. On April 19, 1971, Holmes' appeal was heard by the Referee who stated in her Decision that she "found no evidence of racial discrimination" and that Holmes "was responsible for his discharge and is entitled to No Award of benefits." (R.Appendix III.) Holmes then filed his Notice of Appeal to the Industrial Commission of Colorado, continuing to allege racial discrimination, and the Industrial Commission, in its Order of June 10, 1971, affirmed the Decision of the Referee. (P. Appendix A). Thereafter, Holmes did not seek review of this order by either the Industrial Commission or the courts.

On March 30, 1971, Holmes filed his complaint against Respondents alleging racial discrimination with the Equal Employment Opportunity Commission, which matter is still pending, as well as with the Colorado Civil Rights Commission. In its answer to the complaint, Respondent, Colorado Springs Coach Company, asserted the defense of res judicata, as well as a general denial of racial discrimination. On September 15, 1972, pursuant to notice a hearing was held before the Civil Rights Commission's hearing officer, who asked if both parties were ready to submit briefs or oral arguments on the matter of res judicata. Petitioners submitted their brief and Respondents gave oral arguments. The hearing officer refused to rule on this issue and the hearing was recessed. (Reporter's Transcript, Vol. I, pp. 11; Claimant's Exhibit 5.) On March 16, 1973, the hearing before the Civil Rights Commission resumed and the hearing completed. On September 24, 1973, the hearing officer issues his Initial Decision in favor of Holmes, ruling therein that Respondent was guilty of racial discrimination and ordered Holmes' reinstatement with back pay. (P.Appendix B at 24.) After the expiration of thirty (30) days, .his decision automatically became the decision of the Civil Rights Commission.

Respondent, thereafter, petitioned the El Paso County District Court for judicial review of the decision of the Civil Rights Commission. The hearing on this petition was held June 7, 1974. On August 14, 1974, the Honorable, Hunter D. Hardeman, issued his order setting aside the decision of and dismissing the complaint before the Civil Rights Commission, by finding and concluding that (1) the facts necessary to support a fair inference of discrimination were not present in this case; (2) the doctrine of res judicata operates as a bar to the Civil Rights Commission, and (3) that the Commission exceeded its authority in the remedies afforded to Petitioner, Holmes.

Petitioner appealed the district court's decision to the Colorado Court of Appeals, and on March 11, 1975, this court

upheld the lower court's decision, holding that the doctrine of res judicata barred the Civil Rights Commission from hearing the charge of racial discrimination. Holmes petitioned for a rehearing, which petition was denied.

Subsequently, Holmes petitioned for a writ of certiorari from the Colorado Supreme Court, which court denied the petition on July 7, 1975.

REBUTTAL ARGUMENTS
REASONS FOR DENYING WRIT

Petitioners state that the court below denied due process rights to Petitioner, Holmes, by relegating him to "truncated procedures." (Petitioners' Brief at 11.) Respondents contend that the application of *res judicata* is proper because Holmes was afforded both substantive and procedural due process through a full hearing and judicial review, and that his legal remedies under Title VII of the Civil Rights Act of 1964 have not yet been exhausted.

I. PETITIONER, HOLMES, NOT DENIED DUE PROCESS.

A. Substantive Due Process Afforded Holmes:

1. The Industrial Commission is equally competent to render a just decision as to the reason for Holmes' discharge.

Petitioners point to this Court's decision in the case of *Brinkerhoff-Faris Trust and Savings Co., v. Hill*, 281 U. S. 673 (1930) as a basis for their argument that Holmes was denied an opportunity to be heard. (Petitioners' Brief at 7-8.) *Brinkerhoff*, however, is not on point because the petitioner there had been denied all opportunities to be heard by the state courts. Petitioner, Holmes, on the other hand had afforded to him two

remedies for his complaint, either through the Industrial Commission or the Civil Rights Commission of Colorado.

In addition, Petitioners' "waiver" argument is inappropriate. The issue here is res judicata, not "waiver". Holmes elected to pursue his claim before the Industrial Commission at the outset. Respondents do not contend that, by doing so, Holmes in any way "waived" his right to be heard before the Colorado Civil Rights Commission. By electing such a course of action, however, the Colorado courts have decided that Holmes was precluded from bringing the same claim before another administrative agency. *Umberfield v. School District No. 11* _____ *Colo.* _____, 522 P.2d 730 (1974).

Petitioners further state that it would not be inconsistent to find both that an individual had been discharged because of his race and that he was ineligible for award on other grounds. (Petitioners' Brief at 10.) In order to make a decision as to whether Holmes was entitled to a benefit award, the Industrial Commission had to decide whether Holmes was discharged "through no fault of his own". (C.R.S. 1973, 8-73-108 "Benefit Awards", Petitioners' Appendix E at 48.) As the district court judge stated the issue:

> "In making its decision on unemployment compensation, the Industrial Commission *necessarily* had to decide whether the discharge was the result of a discriminatory act or whether it resulted from misconduct on the part of the claimant." (Petitioners' Appendix C at 29) (Emphasis added.)

Petitioners did not state any hypothetical situations where such an inconsistent decision could be reached, and Respondents contend that such inconsistency is such a remote possibility as to approach the point of impossibility.

Petitioners further contend that it is implicit in the decision now at issue that the unemployment compensation officer was not competent to decide cases of racial discrimination. (Petitioners' Brief at 10-11), and that Holmes was relegated to a procedure before agency officers with "no expertise in employment discrimination." (Petitioners' Brief at 1, 11). Respondents contend that the Industrial Commission was at least as competent as the Civil Rights Commission in reaching a decision as to why Holmes was discharged from his place of employment. In the case of *McGin v. Industrial Commission*, 496 P.2d 1080 (1972), the court of appeals states:

> "The Industrial Commission, serving ex-officio as the Unemployment Compensation Commission, is authorized by statute to make findings of fact. Such authority includes the power to determine the credibility of the witness and the weight to be given their testimonty . . . The Commission has the ultimate responsibility for making the final findings of fact necessary to support its decision."

As District Judge, Hardeman, noted in his review of the Civil Rights Commission proceedings:

> ". . . the Industrial Commission is given broad powers and discretion in granting unemployment compensation, the amount of such award being dependent to a large extent on the reason for Claimant's unemployment. Surely this body could consider the employee's claim of discrimination as well as the reasons advanced by the employer for his discharge in making their decision." (Petitioners' Brief, Appendix C at 29-30.)

In other words, both agencies, in order to reach their respective decisions, had to make a factual finding as to the reason for Holmes' discharge.

Petitioners would assert that the Colorado legislature has, presumably in favor of the Civil Rights Commission's jurisdiction, "balanced the competing interests and devised an adjudicatory process which provides substantial protections to the complainant in employment discrimination cases." (Petitioners' Brief at 11.) Although the intent of the Colorado legislature as to the extent of the jurisdiction of its state regulatory agencies is not relevant to any discussion of federal constitutional rights, Respondents submit that the Colorado Supreme Court has interpreted the legislative intent with regard to the Colorado Civil Rights Commission's jurisdiction.

In the instant case, and in *Umberfield v. School District No. 11 ____ Colo. ____*,522 P.2d 730 (1974), the Supreme Court decided that, where the Colorado Civil Rights Commission has concurrent jurisdiction with another state administrative agency, a prior decision reached by another agency upon the same claim will, on the principle of res judicata, preclude the Colorado Civil Rights Commission from considering that claim. The Colorado rule of statutory construction is that legislative intent is to be ascertained and given effect wherever possible, *Alvarez v. District Court in and for the City and County of Denver*, 525 P.2d 1131 (Colo. 1974); *People v. Stevens*, 517 P.2d 1336 (Colo. 1973);- *People v. Sneed*, 514 P.2d 776 (Colo. 1973), and a statute may not be construed in such a way as to defeat an obvious legislative intent. *People v. Meyers*, 510 P.2d 430 (Colo. 1973); *People v. Lee*, 506 P.2d 136 (Colo. 1973).

This Court has held that the resolution of statute or constitutional issues is the primary responsibility of the courts.- *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The Colorado Supreme Court has already interpreted the intent of that state's legislature with regard to the Civil Rights Commission's jurisdiction. Petitioners, however, are asking this Court to find that the Colorado Supreme Court incorrectly interpreted the legislative intent with regard to the Civil Rights Commission's jurisdiction. That court is the final judicial determinor of the

legislature's intent and this Court has no power to say that the Colorado Supreme Court's decision is inaccurate.

Thus, Respondents submit that Holmes has not been denied access to a tribunal competent to render a just decision as to the reason for his discharge.

2. Colorado statutes provide for judicial review.

Even though Holmes failed to win his case before the Industrial Commission, his rights were protected by the safeguard of judicial review. (C.R.S.1973, 8-74-108, Petitioners' Brief, Appendix E at 62; C.R.S.1963, 82-5-10, Appendix IV.)

Upon judicial review the findings of the commission as to the facts would be conclusive, "if supported by substantial evidence." (C.R.S.1973, 8-74-109, Petitioners' Brief, Appendix E at 62-63; C.R.S.1969, Perm.Supp. 82-5-11, Appendix V.)

Holmes failed to avail himself of judicial review of the Industrial Commission's decision. (Respondents' Brief at 15.) Holmes' failure to seek such review is not a denial of due process.

3. Title VII rights, under the Civil Rights Act of 1964, are still available to Holmes.

As previously stated, Holmes still has a remedy available to him under Title VII of the Civil Rights Act of 1964. (Respondents' Brief at 12.) Respondents contend that it is impossible for Holmes to be denied due process when adequate remedies are still available to him.

Holmes was not denied substantive due process under Colorado law because he was entitled to a hearing as to the reason for his employment discharge and such hearing was subject to judicial review. In addition, Holmes still has an adequate remedy available to him under Title VII of the Civil Rights Act of 1964.

B. Procedural Due Process Afforded Holmes:

1. Petitioner, Holmes, was given full hearing.

After discharge, Holmes chose not to file a grievance with his labor union, Amalgamated Transit Union, Local No. 19; but instead, filed for unemployment compensation benefits. On appeal of the first "No Award" decision, the Industrial Commission's referee had the statutory duty of determining the reason for Holmes' discharge. (C.R.S.1973, 8-73-108, "Benefit Awards", Petitioners' Brief, Appendix E at 48.)

At the referee's hearing, Holmes was given the opportunity to appear personally, (Reporter's Transcript, Respondents' Exhibit 4, at 29, Appendix VI), was allowed to testify in his own behalf, (Reporter's Transcript, Respondents' Exhibit 4, beginning at 29, Appendix VI), allowed to make his allegations of racial discrimination, (Reporter's Transcript, Respondents' Exhibit 4, at 29, 31, 32 & 33, Appendix VI), allowed to cross-examine witnesses, (Transcript continued, at 35, 37, 39 & 40, Appendix VI). It is true that Holmes was not represented by counsel, but neither were Respondents represented by counsel (Reporter's Transcript, Respondents' Exhibit 4, at 29, Appendix VI.) Petitioners do not contend that Holmes was denied the opportunity to be represented by counsel, and there is nothing in the record indicating that Holmes was unable to obtain his own counsel, e.g., a legal services attorney. The referee concluded that there was "no evidence of racial discrimination"; but rather, Holmes was "found to be responsible for his discharge." (Appendix III at No. 51.)

Petitioners contend that Holmes was denied the opportunity to be heard on his claim of discrimination, was relegated to a "truncated procedure" before the referee of the Industrial Commission, and in general was denied a "fair trial" before a "fair tribunal". (Petitioners' Brief at 9.) Petitioners fail to show, however, how the procedures of the Civil Rights Commission

significantly differ from the procedures followed at the hearing before the Industrial Commission's referee. Since Holmes was present at the hearing on the issue of his discharge from employment, was given the right to testify on his own behalf, was allowed to state his claim of racial discrimination, was allowed to cross-examine witnesses, was not denied the assistance of counsel, and received an explicit decision from the referee with regard to his claim of racial discrimination, it can hardly be said that Holmes was denied a "fair trial" before a "fair tribunal".

2. Judicial review was afforded Holmes.

Instead of appealing the ruling of the Industrial Commission, Holmes chose to pursue his case in the Colorado Civil Rights Commission, as set out in Respondents' Restatement of the Case. Respondents appealed the decision of that agency to the district court pursuant to C.R.S.1973, 24-34-308. (Petitioners' Brief, Appendix E at 46-47.) The district court was required to uphold the Civil Rights Commission's ruling if that ruling was supported by substantial evidence. (C.R.S.1973, 24-34-308(6), Petitioners' Appendix E at 47.) The Honorable, Hunter D. Hardeman, district court judge, cited in support of his ruling the case of *Colorado Civil Rights Commission v. School District No. 1*,- Colo.App. 448 P.2d 83, wherein the Colorado Court of Appeals stated in part:

> "In determining whether the Commission's order should stand, the question is not whether this court would come to an identical conclusion upon the evidence certified to it. A court cannot, upon the record of the proceedings before the hearing tribunal, substitute its own discretion for that reposed by statute in that tribunal. Due consideration must be accorded the presumption that an administrative body has acted fairly with proper motives, upon valid reasons and not arbitrarily. *Draper v. Clark Dairy, Inc.* 17 Conn.Supp.

> 93, (Cty.Sup.Ct.). Judicial review of findings made by an administrative body such as the Civil Rights Commission is limited to the question of whether, based upon the entire record, the findings are supported by evidence so substantial that an inference of the existence of a fact may be reasonably drawn. *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d 581."

Thus, Judge Hardeman, not only considered all of the facts presented in the "fair trial" before the "fair tribunal" (the Civil Rights Commission), but he rejected them and concluded that "facts necessary to support a fair inference of discrimination are not present in this case." (Petitioners' Brief, Appendix C at 31.) Petitioner, Holmes, therefore, was provided with the safeguards required to achieve procedural due process.

II. APPLICATION OF *RES JUDICATA* DOES NOT DISCRIMINATE AGAINST PETITIONER, HOLMES, ON THE BASIS OF WEALTH.

The Colorado legislature did not intend to subsidize Civil Rights claimants by negating the "no fault" concept for unemployment compensation through the enactment of the Civil Rights Act. Petitioner, Holmes, asserts that the application of the res judicata doctrine creates discrimination on the basis of wealth. It is a necessary corollary to such assertion that the Colorado legislature intended to create for petitioner the opportunity to apply for and receive unemployment compensation regardless of fault or no-fault, and while being so subsidized, to pursue his claim for further finaicial aid and other assistance through the media of the Civil Rights Commission. That to deny Holmes such subsidy from unemployment compensation, regardless of fault or no-fault is an unreasonable interpretation of the two legislative acts by the Colorado courts.

It is submitted that had the legislature intended such result, it would have been a simple task to have spelled out such

legislative policy in the creation of the Civil Rights Commission legislation. The Unemployment Compensation Act of the State of Colorado, the Civil Rights Act of the State of Colorado and the interpretation of such legislation by the Colorado courts is to the contrary. The cases cited by Petitioners under their Augument II are readily distinguishable: *Harper v. State Board of Elections*- (Petitioners' Brief at 12), require the payment of a fee (poll tax); the case of *Griffin v. Illinois*, required payment for trial transcripts; *Douglas v. California*, required the hiring of an attorney; (Petitioners' Brief at 12), *Smith v. Bennett*, required the payment of a filing fee; (Petitioners' Brief at 13), *Boddie v. Connecticut*,- required payment of court costs and *Lindsey v. Normet*, required a tenant to post a double bond on appeal. (Petitioners' Brief at 14.)

As the Colorado Supreme Court said in the case of *Almarez v. Carpenter*, 173 Colo. 320, 477 P.2d 792 (1970):

> "The plaintiffs seem to equate the administration of justice with affluence. They imply that the balance of the scales of justice is invariably tipped by the financial condition of the litigants. This attitude is as unfortunate as it is unfair. If this were true, workmen would always lose workmen's compensation cases, banks would invariably prevail against the small business man and taxpayers would never succeed in challenging the government. A cursory review of reported decisions will dispel this theory. Many cases, in fact, are affirmed where there is no appearance by the appellee. The profit and loss statements and bank balances of the litgants do not concern courts in their neverending efforts to mete out justice.
>
> To suggest that there is any way, or that it is constitutionally essential, to equalize the financial resources, the competence of opposing counsel and all other

> items that might tend to influence the ability of one side or the other to prevail in a lawsuit is to intimate that there is no possible way to obtain justice under our system."

Petitioners suggest that the only reason for the application of the doctrine of res judicata in the instant case is one of judicial economy. As the court of appeals stated in review of the decision of the district court, the compelling reason for applying res judicata was to prevent confusion in the court system by compelling the same reviewing court to affirm opposite results of two administrative bodies. (Petitioners' Brief, Appendix D at 35.)

Respondents submit, therefore, that the Colorado legislature did not intend to subsidize litigants in a Civil Rights matter by compelling payment to them of unemployment compensation disregarding a "no fault" tenet.

III. APPLICATION OF *RES JUDICATA* DOES NOT DEPRIVE PETITIONER, HOLMES, AND OTHERS SIMILARLY SITUATED OF FEDERAL RIG RIGHTS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Respondents earlier stated in their Brief that Petitioner, Holmes, has not yet elected to avail himself of his Title VII rights under the Civil Rights Act of 1964. Therefore, this issue is not ripe for this Court's decision on certiorari.

Respondents would summarize their response to the allegations of Petitioners Argument III as follows:

1. No action taken by the Colorado courts have in any way denied Petitioner, Holmes', Title VII rights.

2. Holmes has had three hearings before the Industrial Commission, one hearing before the Civil Rights Commission and two

hearings before the district court and court of appeals, as well as a review of the district court and court of appeals, as well as a review of the district court and court of appeals' actions by the Colorado state supreme court. Each hearing and review, except that before the Civil Rights Commission, has been a denial by the commission and the courts that Holmes was discriminated against because of his race. Having thus been afforded his day in court before so many commissions and court hearings, equal protection of the laws guaranteed under the XIV Amendment would dictate that the Colorado Springs Coach Company should not have to further defend the action taken on February 15, 1971, terminating Holmes' employment.

For the reasons given above, Petitioner, Holmes', Petition for certiorari should be denied.

APPENDIX VI

Relevant Parts from Reporter's Transcript of Hearing Before Industrial Commission's Referee. (Respondents' Exhibit 4.)

(Transcript pages noted "pp. _____ ")
(Omissions noted "*")

THE REFEREE: This is the unemployment compensation case of Raymond Wendell Holmes, whose Social Security Number appears in the file as 458-58-4796.

This case is being heard on April 19, 1971, at 2:00 P.M., at Colorado Springs, before Referee Mary K. Rodge.

This is an appeal by the claimant from *two decisions*,- granting No Awards. The purpose of the hearing is to determine whether the claimant is entitled to benefits.

The claimant appears in person. There are two employers involved in this hearing. Colorado Springs Coach Company is represented by Byron Cowart, President and General Manager; William Cooper, Superintendent of Transportation, and O. B. Pumphrey, Shift Foreman. pp. 1*

RAYMOND WENDELL HOLMES, the claimant, being duly sworn, testifies as follows in his own behalf: pp. 2*

Now, Mr. Cowart stated that I voluntarily quit. Which I think he had the dates mixed up, February the 5th. It was February the 13th, 1971. But I didn't quit, I was fired and I have the letter to prove that I was fired, and I feel very strongly it was racial problem there somewhere.

A Well, now on February 13th, Saturday, you tell me you

were injured and you didn't—the next thing you heard from the company was a letter that you received on Monday the 15th?

A That's right, that I was fired.

Q Do you wish to introduce that letter into evidence or do you wish to read it into the record?

A Well, I can read it or you can, either one. I have it here somewhere. It says, "You are hereby notified effective this date, your employment with Colorado Springs Coach Co., has been terminated. This action has taken place for failure to work assigned runs posted for reason not in the best interests of the department. All company belongings or propertys are to be turned in by February the 20th, 1971."

Q And the date of that letter, Sir?

A The date of this letter is February 15th, 1971. pp. 4*

Q Had you any no shows on your record that you recall?

A Yes, I had some no shows on my records yes. But the point is that you're supposed to be—you're supposed to have three no shows before that you can be suspended.

Q That was according to the company-union contract?

A The rules, yes, the company policies. And there have been a lot of fellows that had these and been suspended for three days, and not fired until they completely messed up real bad. pp. 5*

Q Did you file a grievance on this?

A No, I didn't.

Q Do they have a grievance procedure? Is it possible to file a grievance?

A What was the question?

Q Does the union have a grievance procedure if you don't like a dismissal or suspension or something, you have the right to file a grievance?

A I'm not sure, I'm not positive.

Q What union do you belong to?

A It's a—

MR. COWART: May I fill that in for him?

THE REFEREE: Yes, Mr. Cowart, if you would.

MR. COWART: Amalgamated Transit Union Local No. 19.

A (By the claimant) So then can I continue?

Q (By the Referee) Yes.

A And there has been a number of fellows that have met these qualifications of not showing up, and they were suspended. And after the three day's suspension they would come back to work. And the day I was fired Mr. Edgel (Phonetic spelling) was on the board OTR for approximately two weeks. He was on the board approximately two weeks.

Q You're talking about some other employee?

A Yes, some other employee there that didn't show up for three days and he was also suspended for three days — pp. 6*

•

Cross Examination of Raymond Wendell Holmes
by Byron Cowart

Q Well, I'm surprised that if you calim their were racial conditions, why did you come back?

A Well, I didn't necessarily hear—say there were racial conditions involved the first time, did I? I just mentioned that the conditions were much better the first time than the last. pp. 7*

Q Well, this is my question as to when these alleged racial conditions took place?

A Well, personally I think it taken place on February 13, 1971, when you immediately fired me and there has been a number of white boys that's been down there. They have had 10 times more no shows than me, and was not fired. Now, if you don't call this a racial thing, I'd like to know what you call that. I'd like to know your definition of this thing. Why is it that you fired me, so quickly, I'm aware that in this country and at the Colorado Springs Coach Co., also, that Negroes are the first to be, last to be hired, and the first to get fired. Now, I thought you was on the up and up, well, really I have doubts as far as that is concerned, because I understand this thing and I've analyzed you psychologically and I understand it. But the point is, just as I said a while ago, that there has been a number of white boys and I'm going to say white specifically because I'm going to get down to the nitt-gritty, I'm going to tell you just like it is, just how I feel. Has been on the board for no show, for days, days, days, and if they just mess up too bad, and then you will give them a three-day suspension. I know a boy that's just got fired just before that I did had three in a row. Three suspensions in a row, and then you finally seen that the man wasn't any good—

THE REFEREE: Well, Mr. Holmes, I'll have to tell you again. I cannot go into the separations of all the employees that work for this company. pp. 8*

Q My question to Ray is did he not report for work at the 2:20 run on Saturday afternoon the 13th? You did not show up?

A Well, that I think is very plain, I didn't, though that's not why you fired me.

Q Did you show up on the 14th?

A No, I supposed that I would have justice just like any other white boy you put me on no show and OTR.

THE REFEREE: Will you please answer his question, sir. He asked if you showed on the 14th?

A No, I didn't. No, I didn't.

Q Did you show on the 15th?

A No, I come down and I got the letter and to tell you that I'd been sick.

Q I'd like to ask you about this phone call which you stated briefly you are familiar with our phone system? pp. 9*

A Yes.

Q And is it your testimony that nobody answered the phone?

A Right.

Q Do you remember approximately what time this was?

A Well, it was immediately after I came from the doctors' approximately 1:00 or 1:30, something like that.

Q And you did not call in on the 14th or the 15th?

A No, I supposed that I would be on OTR, just the same as all the other boys that I had been seeing on the board OTR.

Q In your previous sick report, didn't you always call in, and let them know you were sick?

A Yes, I called in on February the 13th.

Q Prior to February the 13th?

A Yes. I said, yes. I called in also on February the 13th.

Q So no one answered the phone on the 13th?

A No, it's on answering service as you know that you switch it on answering service after 12:00 o'clock. Do you do that?

Q Are you familiar with the two telephone numbers that we have?

A Yes, I do, but I couldn't memorize it.

THE REFEREE: Why not? — O.K.

Q The Coach Company has two telephones, one which is switched on to automatic answering service, the second number posted on the bulletin board many times for all operators to use, in the case of an operational change or a reporting in, or so forth. Now, haven't you used that other number before?

A Oh, yes, I had. But I said I didn't remember it as this time, I didn't remember it.

Q You didn't remember it the following day, or the following day? pp. 10*

A No, as I stated. I've stated this three times that I thought that I would be on the board as your other fellows that you would work as OTR or as no show. And there wasn't any point. I should have known better. I should have known better, but I didn't.

Q You mentioned one other employee, Mr. Edgel (phonetic spelling). Do you know whether or not he was discharge?

A No, I don't. No, I don't.

Q Since the claimant was referring to Mr. Edgel, I have before me a letter dated February 15th, in which it says essentially the same thing. "That you are hereby notified that your employment with the Coach Company is terminated effective this date." So, I would just like the record to show that.

A Yes, I have a question.

THE REFEREE: Yes, one minute.

MR. COWART: I'm through with my questioning.

THE REFEREE: All right. Mr. Holmes, in view of this cross examination you have a further statement, go ahead.

A Yes, I have one question. Now, Mr. Edgel was on the board, as you have knowledge of, as OTR, for approximately how long? I just want to get your estimation of it?

MR. COWART: I don't know the exact dates.

A O.K. Well, I do. He was on the board at least a week and a half. At least a week and a half, but you didn't seem to find it necessary, wasn't concerned about me and my family or nothing. And you're jeopardizing my family when you send me a letter and say that I'm fired just because I was sick and couldn't show up. I think you're jeopardizing my family.

MR. COWART: I wish to refute this statement made by Mr. Holmes, to the effect that telephone contacts had been made with Mrs. Edgel, describing his sickness and the exact condition during part of this time. And what the reference to lengthy OTR is not even the same in the two cases.

THE REFEREE: All right. Mr. Cowart, was a grievance procedure opened to the claimant? Is it possible to have a grievance procedure through the union? pp. 11*

MR. COWART: Yes.

THE REFEREE: Was any grievance filed?

MR. COWART: There was no official grievance filed. I learned later from the president of the union, that there had been some verbal conversations between the president of the union and

Ray Holmes. But it must have taken place several weeks after the February 13th date. pp. 12*

THE REFEREE: Mr. Cowart, I'd like to ask you have you seen this statement that the doctor has submitted to the Division of Employment, concerning the illness of the claimant?

MR. COWART: No, I haven't.

THE REFEREE: The Referee has just shown Mr. Cowart the physician's certification filed with the Division of Employment. Mr. Cowart, you were not aware that this claimant was under doctor's care at this time of February the 13th?

MR. COWART: This was not reported to the Coach Company. pp. 13*

THE REFEREE: On Monday morning he had a scheduled run. What time was — (Interrupted)

MR. COWART: No, no. He was listed as not available for duty on Monday, because he did not show on Sunday. He was listed for a run on Sunday. pp. 14*

THE REFEREE: Well, the claimant, sir, has referred to a policy where other people were carried OTR for a longer period of time. I don't understand from what you read of the rules there, do you have any definite time or how long you carry anybody OTR?

MR. COWART: Each one of these is evaluated, based upon the reports received from the individual. As I mentioned briefly in reference to Mr. Edbel, we were able to contact his wife and found out he was actually in bed, and was sick, so therefore, you list them OTR for this time. In the case of Ray Holmes, as far as we knew, he had not only abandoned his job, he had not called in, we had no way of getting in contact with him. We'll show you witnesses later where phone calls were made to his home, and he was completely out of the picture.

THE CLAIMANT: O.K. I have a question.

THE REFEREE: All right. Mr. Holmes do you have a question on this phone call, proceed.

THE CLAIMANT: Now, I have a letter here that said that I quit. And then I—but I was fired. Now, Mr. Cowart just stated that he contacted Mr. Engel and found it necessary—(Interrupted)

THE REFEREE: Well, now I don't want to go anymore into the separation of Mr. Edgel, the hearing is going on too long and we cannot go into all of the people who have worked for the company. I'd like to at, this time, to go ahead with the employer's testimony and establish the phone calls and if they have such testimony as Mr. Cowart has indicated, when they finish that, you, Mr. Holmes, will have an opportunity to cross examine each one.

WILLIAM COOPER, being duly sworn, testifies as follows in be half of the emplolyer: BY MR. COWART:

Q I would like for Mr. Cooper to state of his own personal knowledge the circumstances involved in this case.

THE REFEREE: All right, Mr. Cooper, proceed. pp. 16*

A (By Mr. Cooper) At 2:20 Saturday afternoon, Mr. Noxon, who was supposed to be relieved by Mr. Holmes, called in and said that he had not been relieved. So I asked him to go another round and I would try to get ahold of Mr. Holmes.

THE REFEREE: Now, you were at your home or what?

A No, I was on duty.

THE REFEREE: You were on duty?

A On duty Saturday, yes.

THE REFEREE: Mr. Noxon called you?

A Mr. Noxon called me at the bus company garage. He got me on the telephone and told me he was not relieved and I told him that I would try to get a hold of Mr. Holmes.

MR. COWART: May I interrupt please? Let the evidence show that at 2:20 P.M., the telephone did answer at the Colorado Coach Company office. Mr. Copper, personally answered it.

A And I called Mr. Holmes, and no one answered at their home.

THE REFEREE: One minute, Mr. Holmes, make a note of it, if you want, and you can question later, because I want to get this developed. Mr. Cooper, you stated you called the claimant at his home and no one answered°

A No one answered at home.

THE REFEREE: Proceed.

A And then at 3:20, Mr. Noxon called me again, and told me that he hadn't been relieved as yet, and I told him that I could not get ahold of Mr. Holmes, and would he please continue with the run until 7:05 that evening.

THE REFEREE: Very well, have you anything else to say?

A That's all I have to say.

MR. COWART: I'd like to point out that what Mr. Cooper just said amounted to 13 hours operation of a bus that day by Mr. Noxon.

THE CLAIMANT: That's against the law isn't it?

MR. COWART: That this was caused by — caused undue hardship on the company, as the result of this employee. He did not report in and 13 hours is over what a normal bus driver should drive a bus. But these were — the situation created an emergency condition. pp. 17•

THE REFEREE: All right, Mr. Holmes, do you have a question to ask of Mr. Cooper?

THE CLAIMANT: Yes, first of all, he said that he called my house at 2:20. Well, at 2:20 I was in the bed, my wife was washing and I couldn't answer the phone, so I don't say that you didn't call. But I couldn't answer the phone because my back—.

MR. COOPER: Well, no one answered the phone.

THE CLAIMANT: Yes, well, no one answered the phone.

MR. COOPER: Well, I said no one answered the phone.

THE CLAIMANT: O.K. fine. I'm sorry I have no squawk with you. Now, Mr. Cowart is saying that Mr. Noxon, I brought hardship on Mr. Noxon. Well, this is very well true 13 hours, but I have worked a lot of these 13 hours. Now then if you have not respected me then this is a horse of another color. Plus the fact, the evidence, that I was sick and I couldn't relieve Mr. Noxon. This is the point, I'm holding this to be self-evidence.

THE REFEREE: All right. Mr. Cowart, have you some more witnesses?

MR. COWART: Mr. Pumphrey is here with us, and in listening to this is there anything you want to say?

THE REFEREE: One minute please.

O. B. PUMPHREY, being duly sworn, testifies as follows in behalf of the employer: BY THE REFEREE:

Q Mr. Pumphrey, have you anything to add to this, any direct testimony?

A No, I think just about all of it has been said.

Q Have you any personal information about any of the things that happened on that weekend? pp. 18•

A (By Mr. Pumphrey) Well, nothing but about a week before, he spoke and said he was going to the dog races.

THE REFEREE: He said he was going to the dog races, when?

A Right. When do the dog races start? I don't know when they start, but Denver up there, Loveland, or where ever they started.

MR. COWART: Byers.

THE REFEREE: You don't have any information that he went he just told you the week before that he was going?

A I don't have any information that he went, but he said that he was you know, going to quit and go to the dog races.

THE REFEREE: Mr. Holmes, have you any questions to ask Mr. Pumphrey?

THE CLAIMANT: No, I have never mentioned that I was going to the dog races. But in case, even that I did, the fact was that I was under the doctor's care and I couldn't very well easily go to the dog races, my back was — I was down in my back.

THE REFEREE: Have you any other testimony, Mr. Cowart?

MR. COWART: I have no further testimony.

THE REFEREE: Mr. Holmes, have you any further testimony?

THE CLAIMANT: No, I don't.

THE REFEREE: I think we've covered this separation from the Colorado Coach Company. And we won't come back to this again, so if you people who are from the Coach Company desire to leave you may, if you wish to stay you may.

MR. COWART: Thank you, we'll leave.

RAYMOND WENDELL HOLMES, the claimant, having been sworn, testified further in his own behalf: BY THE REFEREE:

Q Joslyn Fruit Company, you worked, according to our information, you were separated from them on July 2, 1970, does that seem correct to you?

A Yes.

Q Did you quit there, or were you discharged? pp. 19•

APPENDIX I

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CONCILIATION FAILURE
NOTICE OF RIGHT TO SUE

CASE/CHARGE NUMBER
YDE5-195

The Commission has found reasonable cause to believe your charge of employment discrimination is true but has not entered into a conciliation agreement to which you would have been a party because attempts to achieve such a voluntary settlement with the respondent(s) have been unsuccessful.

The Commission has determined that it will not bring a civil action against the respondent(s) and accordingly is issuing you this Notice of Rights to Sue. The issuance of this Notice terminates the Commission's processing of your charge, except that the Commission may seek status as intervenor if you decide to sue on your own behalf as described below.

If you want to pursue your charge further, you have the right to sue the respondent named in this case in the United States District Court for the area where you live. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT IS LOST.

If you do not have a lawyer or are unable to obtain the services of a lawyer take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

You have a right to inspect and copy information contained

in the Commission's case file for use in a public court proceeding if you decide to sue. If you want to inspect this material, need help in filing your case in court or have any questions about your legal rights contact the EEOC representative named above.

An information copy of this Notice has been sent to the respondent(s) named in your case.

December 19, 1975
Date

JAMES G. STONE
Deputy District Director

APPENDIX II

State of Colorado
Department of Labor and Employment
DIVISION OF EMPLOYMENT
1210 Sherman Street
Denver, Colorado 80203

NOTICE OF APPEAL TO REFEREE

DD-No. 5496-71
RD-No.

SS No. 458-58-4796

Appellant:
Raymond Wendell Holmes
424 Placid Road
Colorado Springs, Colorado 80910

Appellee:
AACT No. 01197.00
Colorado Springs, Coach Company
Box 1180
Colorado Springs, Colorado 80901

A hearing before a Referee has been requested by the above-named appellant for the purpose of reviewing a decision issued by a Deputy of the Division of Employment. The appellant has given the following reasons for this appeal:

BM-20 filed on Joslyn Fruit Company

First of all, I called the office the morning of my termination and a lady in the office took the call and I told her to tell the foreman that I wouldn't be coming back to work. I was promised

a job at Colorado Springs Coach Company any time I wanted it by Mr. Cowart. I went to work the next day after telling Mr. Cowart that I wanted my old job back. This was in July, 1970. Joslyn Fruit Company stated in the letter I received from your office that I hadn't been offered a better job. This is not true. I have a family of six to take care of and I could not on the rate of pay I received and the hours. The job was only temporary when I accepted, but I needed the work. I could not depend on it as it was only seasonal and not much at all.

BM-20 filed on Colorado Springs Coach Company

First of all, I did not quit work. I was fired as I have the letter to prove and secondly, it was February 13, 1971, that I did not report to work and not February 5, 1971, as Colorado Springs Coach Company claims. I called the office on February 13 in the evening. No one answered. I belonged to the Transit Union which states as one of its laws that if a driver does not report to work and does not call, he is put on O.T.R. I did call. I have my doctor's report of my back injury and I turned it in to the employment office. No doctor's report was ever requested by Colorado Springs Coach Company until I applied for compensation. I was the only negro driver there and I have seen many white drivers put on O.T.R. without calling at all. I do not see why I should be treated differently. I was reported to have quit when truthfully I was fired as my letter proves and reasons were stated in their report to you other than what was written in my letter of termination.

You will be notified of the place and the date of hearing or of other action of the Colorado Division of Employment.

All issues and factual matters affecting claimant's eligibility and qualifications for benefits will be heard under Chapter 82 of the Colorado Revised Statutes 1963 as amended. The referee is not bound by the findings or decision of the deputy

and the hearing will be in the nature of a trial on all relevant issues.

The particular sections cited by the Deputy were: 82-4-8 (6) (b) (vii) 82-4-8 (4) (c) (i)

FOR DEPARTMENT USE ONLY:

Date Mailed: March 29, 1971

Dale Claim Filed: February 18, 1971 (initial)
Date of (Separation) (Refusal): July 2, 1970; February 5, 1971
Deputy's Decision Mailed: March 22, 1971
Date of Appeal to Referee: March 25, 1971

APPENDIX III

STATE OF COLORADO
DEPARTMENT OF LABOR AND EMPLOYMENT
DIVISION OF EMPLOYMENT
1210 SHERMAN STREET – DENVER, COLORADO 80203
AREA CODE 303, TELEPHONE 222-1551

REFEREE'S DECISION

Raymond Wendell Holmes
424 Placid Road
Colorado Springs,
Colorado 80910
SS No. 458-58-4796
(Appellant)

REGARDING UNEMPLOYMENT
INSURANCED CLAIM OF

INTERESTED PARTY
Joslyn Fruit Company
and
Colorado Springs Coach
Company

TYPE OF CASE
Voluntary Quit

APPEARANCES: The claimant appeared in person. Employer, Colorado Springs Coach Company was represented by Byron Cowart, President and General Manager; William Cooper, Superintendent of Transportation, and O. B. Pumphrey, Shift

Foreman. The employer, Joslyn Fruit Company was represented by Charlie Wood, General Manager. This hearing was held on April 19, 1971, in Colorado Springs, Colorado.

ISSUE: The claimant appeals the deputy's decision finding he was entitled to No Award of benefits by reason of separation from employment on July 2, 1970 and February 5, 1971, under the provisions of Chap. 82-4-8 (6) (b) (vii) and 82-4-8 (4) (c) (i), Colorado Rev. Stat., 1963, as amended.

FINDINGS OF FACT AND CONCLUSIONS: The claimant worked for Joslyn Fruit Company for several months prior to July 2, 1970. The claimant's testimony established that he considered this temporary, seasonal employment, and that he left because he was not making enough money to support his family. At the time he quit he believed he could be rehired by Colorado Springs Coach Company, a previous employer, but he did not have a definite job offer and, in fact, did not begin work with that company until July 15, 1970.

It is concluded that the claimant quit his job with Joslyn Fruit Company on July 2, 1970 to look for another job, and he is entitled to No Award of benefits.

The claimant had two periods of employment with Colorado Springs Coach Company, the last period being from July 15, 1970 to February 13, 1971. The testimony of the claimant established that on July 13, 1970 he worked his regularly scheduled morning run and that in the break before his afternoon run he was playing basketball with his son and injured his back necessitating medical attention, and that he was unable to make the afternoon run. The claimant testified he attempted to call the employer but did not get an answer on the telephone and assumed he would be put on "Out Till Report" on the board.

Testimony of employer representatives established that no

report was received from the claimant the afternoon of July 13, 1970 that two phones were available for him to call in on, that a foreman was present to answer the telephone and in fact did receive a call from the driver whom the claimant was expected to relieve, that an attempt was made to call the claimant at his home but the telephone was not answered, and that the claimant's failure to notify the employer in advance of his inability to meet his assignment created an emergency and the other driver had to work thirteen hours in a stretch. It was further established that the claimant failed to meet his Sunday schedule or to call in, and on Monday the employer sent him a letter of discharge.

The claimant contended he was treated differently from other drivers because of his race. The Referee finds no evidence of racial discrimination. The claimant was a member of Amalgamated Transit Union Local No. 19. No grievance was filed.

The claimant was a member of Amalgamated Transit Union Local No. 19. No grievance was filed.

It is concluded that the claimant was discharged when he failed to make his scheduled runs or to inform the employer of his reason, and he is found to be responsible for his discharge and is entitled to No Award of benefits.

DECISION: The separation from Joslyn Fruit Company on July 2, 1970 is covered by section 82-4-8 (6) (b) (vii) of the law and the claimant is entitled to No Award. The decision of the deputy is affirmed.

The separation from Colorado Springs Coach Company on February 13, 1971, is covered by the Optional Award Authority in Section 82-4-8 (7) of the law and Regulation 39-C and the claimant is entitled to No Award. The decision of the deputy is modified as to citation of law and as modified is affirmed.

ps

Mary K. Rodge, Referee

APPENDIX IV

LABOR III – EMPLOYMENT SECURITY

82-5-10. Appeal to courts.—(1) Any decision of the commission shall be final unless a petition to review same shall be filed by an interested party. Every petition for review shall be in writing and shall specify in detail the particular errors and objections. Such petition must be filed within ten days after the entry of the decision of the commission unless further time is granted by the commission within said ten days, and, unless so filed, said decision shall be final. All parties in interest shall be given due notice of any decision of the commission, and said period of ten days shall begin to run only after such notice, and the mailing of a copy of the said decision addressed to the last known address of any party in interest shall be sufficient notice.

(2) No action, proceeding or suit to set aside, vacate, or amend any findings or decision of the commission, or to enjoin the enforcement thereof, shall be brought unless the plaintiff shall have first applied to the commission for a review as herein provided.

APPENDIX V

ARTICLE 5

Claims for Benefits

82-5-11. Court review.—Such action, proceeding, or suit must be commenced within twenty days after the final findings or decision of the commission, and any party aggrieved thereby may secure judicial review thereof by commencing an action in the court of appeals for the review of the commission's findings or decision in the same manner as reviews are now provided by law in workmen's compensation cases. The commission, in its discretion, may also certify to such court questions of law involved in any decision by it. In any judicial proceeding under sections 82-5-1 to 82-5-11, as amended, the findings of the commission as to the facts, if supported by substantial evidence and in absence of fraud, shall be conclusive. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the workmen's compensation law of this state. If the supreme court reviews the judgment of the court of appeals, such review shall be limited to a summary review of questions of law. Any such action shall be advanced upon the calendar of the supreme court, and a final decision shall be rendered within sixty days after the supreme court grants further appellate review.

CERTIFICATE OF SERVICE

I hereby certify I have, in compliance with U. S. Supreme Court, Rule 33, para.3(b), this _____ day of February, 1976, deposited three (3) copies of the foregoing Response to Petition for Writ of Certiorari in the U.S. Mails, first class — postage prepaid, and addressed to petitioners:

Colo. Civil Rights Commission
Office of the Attorney General,
State of Colorado
c/o Mary J. Mullarkey
1st Asst. Atty. General
1365 Logan Street
Denver, Colo. 80203

Raymond Wendell Holmes
c/o Office of the Attorney
General, State of Colorado
J. D. MacFarlane,
Attorney General
1365 Logan Street
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Attorneys for Petitioners